Supreme Court, U.S.
FILED

96 117 JUN 16 1996

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No. 95-

Supreme Court of the United States

October Term, 1995

CHESTER MAXWELL, GRACE MAXWELL BROWN, JEWELL E. CAUDLE, WAUNETTE JOHNSON, JAMES A. MAXWELL, PATSY DAVENPORT, and BILL MAXWELL,

Petitioners,

vs.

SAMSON RESOURCES COMPANY,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeals Division No. III State of Oklahoma

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. When the highest court of the state changes the standard of proof for awarding treble damages under a state statute, reverses the judgment for plaintiffs based upon an error of law by the trial court and remands the case to the trial court for further proceedings consistent with its opinion, does the Due Process Clause of the Fourteenth Amendment require that the new judgment entered by the trial court on remand be reviewed on its merits by the appellate court in light of the new standard of proof or may the new judgment be summarily vacated without review of the substantive findings?

2. Where the trial court erred as a matter of law, but the error only became prejudicial to the party who prevailed at trial when the trial court's judgment was reversed and remanded on appeal, does due process require that the judicial error be corrected on remand?

LIST OF PARTIES

In the proceedings before the Oklahoma Courts, the parties were Chester Maxwell*, Grace Maxwell Brown*, Jewell E. Caudle, Waunette Johnson, James A. Maxwell, Patsy Davenport*, Bill Maxwell and Samson Resources Company.

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*These persons are now deceased.

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS DIVISION NO. III STATE OF OKLAHOMA

The heirs of George S. Maxwell respectfully petition this Court for a writ of certiorari to review the memorandum opinion of the Oklahoma court of appeals which vacated the second judgment for treble damages entered by the trial court, following remand of this case, without any consideration of the substantive findings of the trial court which were made in accordance with the rulings of the Oklahoma supreme court in its mandate reversing and remanding the first treble damages judgment.

OPINIONS BELOW

The unreported memorandum opinion of the Oklahoma court of appeals is reprinted in the Appendix. *See infra* App. 2a-9a. The order of the court of appeals denying rehearing is reprinted *infra* at App. 68a. The order of the Oklahoma supreme court denying petition for writ of certiorari to the court of appeals is reprinted *infra* at App. 1a. The opinion of the Oklahoma supreme court in the first appeal in this case is reported at 848 P.2d 1166 and reprinted *infra* at App. 28a-46a. The journal entry of judgment following the trial of the case is reprinted *infra* at App. 12a-18a. The unreported memorandum opinion of the Oklahoma court of appeals in the first appeal in the case is reprinted *infra* at App. 19a-27a. The memorandum decision of the trial court following remand of the case is reprinted *infra* at App. 47a-55a. The journal entry of judgment

of the trial court following remand of the case is reprinted *infra* at App. 56a-60a.

The opinion of the Oklahoma supreme court affirming the constitutionality of the statute on which petitioners' claims are based is reported at 725 P.2d 278 and reprinted *infra* at App. 89a-131a.

JURISDICTION

The Oklahoma supreme court denied petitioners' petition for writ of certiorari to the court of appeals on March 20, 1996. This petition is being filed less than ninety days after the denial of certiorari by the Oklahoma supreme court. This Court has jurisdiction over this case pursuant to 28 U.S.C. §1257.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *See infra* App. 138a.

STATEMENT OF THE CASE

The petitioners, heirs of George S. Maxwell, (hereinafter "the Maxwells") are the owners of mineral interests that have been developed by the drilling and production of the Kinnikin #1 well located in a drilling and spacing unit established by the Oklahoma Corporation Commission in Pittsburg County, Oklahoma. Samson Resources Company

(hereinafter "Samson") is the operator of the well which commenced producing gas in February 1984. Although the Maxwells notified Samson of their mineral interests, Samson did not pay the Maxwells their proportionate share of the revenues from sales of gas.

In 1983 the Oklahoma Legislature enacted a statute, commonly described as the "Sweetheart Gas Bill," the purpose of which was to assure that all owners of interests in producing gas wells in Oklahoma would have the opportunity to sell their share of production from wells in which they owned interests.[1] The bill, which was codified as 52 Okla. Stat. (1983 Supp.) §§541-47[2], was enacted to correct predatory and discriminatory practices in the sale of gas production that had favored sales of gas by some owners of interests in gas wells over other owners. 52 Okla. Stat. §547 granted the right to "any owner who is injured in business or property by any other owner in the well by reason of any action in violation of the provisions of this act to sue in the courts of this state and to recover threefold the damages so sustained, the costs of the suit, and reasonable attorneys fees to be fixed by the court." *See infra* App. 136a-137a.

In 1987, the Maxwells filed an action in the District Court for Pittsburg County, Oklahoma, against Samson in which they sought to recover their proportionate share of the revenues obtained from the sale of production from the

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[1]The statute is reprinted *infra* at App. 132a-137a.

[2]The statute was amended effective September 1, 1992, and renumbered as 52 Okla. Stat. §§581.1-581.10.

Kinnikin #1 well based upon the provisions of 52 Okla. Stat. §540 and 52 Okla. Stat. §§541-47. The year before petitioners filed their action in the district court, the Oklahoma supreme court affirmed the constitutionality of the "Sweetheart Gas Bill", 52 Okla. Stat. §§541-47, which had been challenged in the case of *Seal v. Oklahoma Corporation Commission*, 725 P.2d 278 (Okla. 1986).[3] In regard to 52 Okla. Stat. §547, the Oklahoma Supreme Court stated in *Seal*:

> Seal's final challenge to the Rules is concerning the negligence or willful misconduct standard in hearings before the Commission imposed by Rule 6-112. Seal seeks clarification of this Rule in relation to Section 547 which grants the Commission the power to enforce penalties for violations of the Act *and also affords the right to injured parties to recover treble damages for violations of the provisions of the Act in district court*. The Commission attempts to justify Rule 6-112 by asserting such Rule has no application to district court treble damage remedies authorized by Section 547. It maintains an action before the Commission to recover on liabilities from a breach of obligations imposed by the Rules is a totally separate and distinct action from one in district court for breach of the statutory duties. *We find no distinction for*

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[3]The opinion in *Seal v. Corporation Commission, supra,* is reprinted in the Appendix. *See infra* App. 89a-131a. The above quotation is found at App. 129a-130a.

> *the Rules were promulgated to administer the purpose of the Act. The practical effect of different standards for measuring liability in district court and the Commission would force parties to seek their remedies in district court where treble damages may be recovered without fault. We find the standard for penalties to be enforced by the Commission for violations of the Act and the Rules promulgated for its administration should be that imposed by Section 547 for district court actions.* We therefore find Rule 6-112 to be invalid in this regard. (emphasis added) *See infra* App. 129a-130a.

The Maxwells' claims against Samson were tried to the district court on May 16, 1988. The court ruled that the Maxwells were entitled to their proportionate share of the proceeds of production from the Kinnikin #1 well, less their share of the costs and expenses of the well, plus interest thereon. The court further ruled that Samson's actions were in violation of the "Sweetheart Gas Bill" and that pursuant to 52 Okla. Stat. §547, the Maxwells were entitled to threefold damages for injuries suffered in business or property under the provisions of 52 Okla. Stat. §§542-47. The trial court stated that it appeared to him that Samson did not make payments or acknowledge the debt in an effort to purchase the lease from the Maxwells. *See infra* App. 10a-11a. However, the court made no finding in regard to the intent of Samson to injure the Maxwells because the court believed it was not necessary to reach that issue. The trial judge said, "The Court really doesn't

have to decide on that, as the indebtedness is the same either way." *See infra* App. 11a. In making that determination, the trial court relied on the language in *Seal v. Oklahoma Corporation Commission, supra*, regarding recovery of treble damages without fault in a district court action. *See Infra* App. 48a-49a.

Samson appealed the judgment of the trial court arguing *inter alia* that to apply the treble damages provisions of Section 547, there must be a finding of *mens rea*. In the first appeal of this case, the Oklahoma court of appeals responded to Samson's argument as follows:

> Dispositive of the first alleged proposition of error that there must be a finding of *mens rea* before treble damages can be recovered is *Seal v. Corporation Commission*, 725 P.2d 278, 298 (Okla. 1986). In *Seal*, the court held that in the district court treble damages may be recovered without fault. *See infra* App. 24a.

The court of appeals affirmed the trial court except for the calculation of interest, which the appellate court ruled should be compounded on an annual rather than a monthly basis. *See infra* App. 27a.

The Oklahoma supreme court granted the petition for writ of certiorari filed by Samson. In *Maxwell v. Samson Resources Co.*, 848 P.2d 1166 (Okla. 1993), the Oklahoma supreme court agreed with the ruling of the court of appeals that interest should be compounded annually rather than

monthly. The supreme court differed with the court of appeals in ruling on the issue of treble damages. The court altered the standard of proof expressed in *Seal, supra*, and ruled that the treble damages provisions of 52 Okla. Stat. §547 may not be imposed on a mere showing that revenues have not been paid from the proceeds of gas sales. "Rather, some degree of wrongful intent or motive must be proven by an owner in a gas well to recover threefold damages." *See infra* App. 45a. The court concluded its opinion as follows, "For the above and foregoing reasons, the opinion of the Court of Appeals is VACATED, the judgment of the trial court is REVERSED and the case is REMANDED for further proceedings consistent with this opinion." *See infra* App. 46a.

On September 20, 1993, the trial court conducted a hearing on the issue of whether Samson's conduct demonstrated wrongful intent or motive to injure the Maxwells in their property or business. The Maxwells, in their case in chief, only presented portions of the transcript of the original trial. Samson was allowed, over the Maxwells' objection, to introduce new testimony and documents not presented in the first trial. The Maxwells cross examined Samson's witnesses and effectively impeached their testimony. In the memorandum decision following remand of the case, the trial court stated that no finding of wrongful intent or motive on the part of Samson was made in the original trial because the court incorrectly believed that such a finding was unnecessary. *See infra* App. 48a-49a. The court concluded:

> Extensive evidence was presented as to the acts of the parties and their dealings with each other

at the original hearing and the Court has reviewed the testimony presented at that time. Much of that testimony, particularly as it dealt with any wrongful actions, was repeated in the rehearing of this case and extensive arguments were made based on the testimony presented.

. . . The Court noted in its' findings in the original trial that there was a question if Samson had made an honest mistake or a deliberate effort to cheat; the Court stated in open court that "[I]t seems to me that the defendant (Samson) did not make payments or acknowledge the debt in an effort to purchase the lease. . . ." [T]he Court notes that in 1986 Samson attempted to lease the property from the plaintiffs while improperly withholding proceeds from production. [T]he Trial Court is particularly troubled by the defendant's efforts to obtain a lease from the plaintiffs while withholding vital information concerning the value of the property. The Court believes that Samson deliberately withheld facts as to the productivity of the well at a time when the well had already produced sufficient revenue to cover all costs of the well.

. . .

The Court finds under the facts in this case that Samson negotiated with the plaintiffs in bad faith, that if it was not acting with intentional misconduct it was acting with wanton disregard

> of the rights of the plaintiffs and deliberately avoided knowledge it would have had a duty to import to the plaintiffs. The Court finds that the failure to pay plaintiffs for their interests in the Kinnikin well was an intentional violation of plaintiffs' rights. Defendant's actions certainly fit the description of Title 23 O.S. §9 which allows exemplary damages where the conduct evinces "a wanton or reckless disregard of another." *See infra* App. 51a-54a.

The trial court entered judgment for petitioners. *See infra* App. 45a-60a. Samson appealed.

In the second appeal to the Oklahoma court of appeals, that court ruled that the trial court committed fundamental error in revisiting the issue of treble damages. The court of appeals vacated the judgment for the Maxwells. *See infra* 2a-7a. The Maxwells filed a motion for rehearing in the court of appeals which was denied.[4] *See infra* App. 61a-68a. The Maxwells

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[4]20 Okla. Stat. (1991) §30.1 states as follows:

> There is hereby established an intermediate appellate court to be known as the Court of Appeals of the State of Oklahoma which shall have the power to determine or otherwise dispose of any cases that are assigned to it by the Supreme Court. Its decisions, when final, shall neither be appealable to the Supreme Court nor be subject to reexamination by another division of the Court of Appeals or by the Judges of that Court sitting en banc.
>
> . . .
>
> A decision of the Court of Appeals may be reviewed by

filed a petition for writ of certiorari in the Oklahoma supreme court. *See infra* App. 69a-88a. The petition was denied. *See infra* App. 1a.

The decision of the Oklahoma court of appeals not to consider the findings made by the trial court pursuant to the new standard of proof announced by the supreme court in the first appeal in this case and the denial of certiorari by the supreme court were unexpected decisions that gave rise to the federal question of whether the Maxwells have been deprived of property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States.[5]

In this case, the supreme court announced the new standard of proof for recovery of treble damages and remanded the case to the trial court for further proceedings consistent with its opinion. An appellate court's decision settles and determines the questions presented. *Handy v. City of Lawton*, 835 P.2d 870, 873 (Okla. 1992). "The decisions on the first appeal become the 'law of the case' in all subsequent stages." *Pyle v. Pennington Grocery Co.*, 187 Okl. 133, 101 P.2d 847

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the Supreme Court if a majority of its Justices direct that certiorari be granted, and the Supreme Court may by order recall a case from the Court of Appeals.

[5]This Court has ruled that federal claims have been adequately presented even if they have not been raised in lower state courts when the highest state court renders an unexpected interpretation of state law or reverses its prior interpretation. *Pruneyard Shopping Center v. Robbins*, 447 U.S. 74, 86 n.9 (1980). *See also Missouri ex rel Missouri Ins. Co. v. Gehner*, 281 U.S. 313, 320 (1930).

(1940). In *Berland's Inc. of Tulsa v. Northside Vil. Shop Ctr.*, 447 P.2d 768 (1968), the court discussed the procedure on remand:

> When a cause is reversed and remanded by the Supreme Court and the mandate is received and entered of record by the trial court, then the trial court is vested with jurisdiction to make any order or enter any judgment in the further progress of the cause not inconsistent with the decision of the Supreme Court, and in making such orders the trial court has jurisdiction to interpret the decision and mandate of the Supreme Court.

Until the court of appeals ruled that the trial court erred in correcting the error of law regarding the standard of proof on remand, only Samson had been able to appeal the decisions of the Oklahoma courts regarding the Maxwells' claims under the Oklahoma statutes. The Maxwells had no opportunity to appeal the judicial error of the trial court in failing to make a finding of fault on the part of Samson because the judgments of the trial court were not adverse to the Maxwells. The Oklahoma Supreme Court stated in *Jackson v. Huddleston*, 397 P.2d 132 (Okla. 1964) that it is a fundamental principle of law that the right to invoke judicial actions carries with it the right to appeal from an adverse decision, unless the remedy of appeal is denied by statute. Because the court of appeals vacated the judgment for the Maxwells without following the law of the case or considering the new standard of proof announced by the Oklahoma supreme court, the judicial error of the trial court

remains uncorrected and subsists to deprive the Maxwells of their statutory claim for treble damages.

In their motion for rehearing to the Oklahoma court of appeals and petition for writ of certiorari to the Oklahoma supreme court, the Maxwells emphasized that the decision of the court of appeals denied them any opportunity to appeal the error of law of the trial court. They argued that they are entitled to have their claim for treble damages reviewed in light of the new standard of proof announced by the supreme court in *Maxwell v. Samson, supra.* The Maxwells cited many cases in which the United States Supreme Court had remanded cases to the lower courts to be reviewed in light of recent decisions, particularly in regard to the standards for the award of punitive damages. *See infra* App. 62a-67a; 69a-87a. When the highest court of the state denied the Maxwells' petition for writ of certiorari, the Maxwells were denied the right to have their claim for treble damages under the Oklahoma statute considered in light of the applicable law. Even though the trial court found that the Maxwells had met the new burden of proof announced by the supreme court in its ruling on Samson's appeal in this case, the Maxwells were precluded from pursuing those claims. The rulings of the Oklahoma courts have deprived the Maxwells of their rights and property without due process of law.

REASONS FOR GRANTING THE PETITION

I. THE COURT OF APPEALS DENIED THE MAXWELLS THE RIGHT TO HAVE THEIR CLAIM FOR TREBLE DAMAGES UNDER THE OKLAHOMA STATUTE DETERMINED ACCORDING TO THE APPLICABLE LAW

The provisions of the Oklahoma statute, which provided a remedy to the Maxwells and other persons who had not been paid proceeds attributable to their mineral interests, as well as the conditions the statute was designed to correct, are described in the opinion of the Oklahoma supreme court affirming the constitutionality of the 52 Okla. Stat. §§541-547. *Seal v. Corporation Commission, supra.* *See infra* App. 93a-99a. Under the statute, Samson, the operator of the Kinnikin #1 gas well, has a duty to market production from the well. In August of 1985, Samson received actual notice of a journal entry of judgment quieting the Maxwells' title to their interest in the Kinnikin well, but Samson did not contact the Maxwells about marketing their share of the gas produced by the well. Despite repeated demands by the Maxwells for payment of all monies owed to them, Samson did not pay the Maxwells anything for their working interest share of the proceeds of production from the well. Samson did not even pay the Maxwells their royalty interest share of production until after the Maxwells filed their lawsuit in March of 1987. It was not until May of 1993 that Samson paid the Maxwells any of their working interest proceeds in the well. Samson held the Maxwells' money and instigated systematic efforts to keep the working interest

portion for itself. The memorandum decision of the trial court following remand of the case memorialized the findings of the court regarding the Maxwells' right to recover treble damages under the Oklahoma statute based on Samson's acts and omissions that injured the Maxwells in their business or property. *See infra* App. 47a-55a.

This Court has analyzed the nature of a property interest by stating that the hallmark of property is an individual entitlement grounded in state law, which cannot be removed except "for cause." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982) citing *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 11-12 (1978); *Gross v. Lopez*, 419 U.S. 565, 573-74 (1975); *Board of Regents v. Roth*, 408 U.S. 564, 576-578 (1972). In *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), this Court held that a cause of action is a species of property protected by the Due Process Clause of the Fourteenth Amendment.

> The Court traditionally has held that the Due Process Clauses protect civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances.

Logan, supra, at 429. In the *Logan* case, the Court found that the state system for processing claims under the Illinois Fair Employment Practices Act had deprived Logan of his cause of action without due process of law. The acts of the judiciary as well as those of an administrative agency or legislature may also cause a deprivation of property rights. In the matter before

this Court, the Maxwells' cause of action under 52 Okla. Stat. §547 was extinguished by the opinion of the court of appeals which vacated the judgment of the trial court without any consideration of the merits of the findings on which the judgment was based.

In the case of *Brinkerhoff-Faris Co. v. Hill*, 281 U.S. 673, 682 (1930), this Court observed:

> Whether acting through its judiciary or through its legislature, a State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it.

In the *Logan* case, after making the finding that Logan had been deprived of a property right, the Court turned to the procedural due process question of what process is due.

> As our decisions have emphasized time and again, the Due Process Clause grants the aggrieved party the opportunity to present his case and have its merits fairly judged. Thus it has become a truism that "*some* form of hearing" is required before the owner is finally deprived of a protected property interest. *Id.* (citing *Board of Regents v. Roth*, 408 U.S. 564, 570-571, n.8 (1972). Emphasis in original.)

Logan v. Zimmerman Brush Co., supra at 433.

In the analysis of what process is due, the courts have considered the importance of the private interest, the length or finality of the deprivation, the likelihood of governmental error and the magnitude of the governmental interests involved. *See Logan v. Zimmerman, supra* at 434, citing *Gross v. Lopez, supra*; *Memphis Light, Gas & Water Div. v. Craft, supra*; *Matthews v. Eldridge,* 424 U.S. 319 (1976); *Wolfe v. McDonnell*, 418 U.S. 539, 558 (1974). In applying those considerations to the matter of the Maxwells' right to procedural due process, there should be no conflict between the importance of the private interest and the magnitude of the governmental interest. The interest of the Oklahoma courts in finality should not outweigh the interest of private citizens and the State of Oklahoma in judicial decisions being based on the merits of the claims according to the applicable law of the case. The Maxwells and the State of Oklahoma share an interest in the implementation of the remedial statute enacted by the Oklahoma legislature to help insure that property owners receive their proportionate share of revenues attributable to their mineral interests. In regard to the deprivation suffered by the Maxwells, the deprivation caused by the rulings of the Oklahoma appellate courts is a final deprivation of the cause of action for treble damages. Since the judgment for the Maxwells on their cause of action for treble damages was summarily dismissed by the court of appeals without consideration of the basis of the judgment or reference to the law of the case, the likelihood of governmental error appears to be great.

When the court of appeals summarily vacated the judgment of the trial court on remand without considering the

substantive findings of the trial court in light of the new standard of proof announced by the Oklahoma supreme court in the case, the court denied the Maxwells one of the established common law protections against arbitrary decisions which is fundamental to procedural due process, the review of the case on the merits.

In *Honda Motor Co., Ltd. v. Oberg,* 114 S.Ct. 2331 (1994), this Court considered whether the Oregon statute which prohibited judicial review of the amount of an award of punitive damages was consistent with the Due Process Clause of the Fourteenth Amendment. The Court observed that the state's abrogation of the common law protection of judicial review raised a presumption that its procedures violated the Due Process Clause. The Court observed that in *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, (1991) and *TXO Production Corp. v. Alliance Resources, Corp.*, 113 S.Ct. 2711 (1993), recent cases in which the Court has reviewed awards of punitive damages, the Court has emphasized the importance of the procedural component of Due Process and the protection against arbitrary decisions afforded by judicial review. *See In re Gault,* 387 U.S. 1 (1966); *Oklahoma Operating Co., v. Love,* 252 U.S. 331, 337 (1920). In *Honda Motor Co., Ltd., supra*, at 2339, the Court concluded that the Oregon statute which prohibited judicial review violated the Due Process Clause.

In the instant case, the Maxwells have been deprived of their cause of action for treble damages without the fundamental due process protection of judicial review. They had no opportunity to appeal the error of the trial court at the time the error was made because it was not adverse to them.

The error became adverse to the Maxwells because the court of appeals refused to allow the error to be corrected. The court of appeals conducted no judicial review of the judgment of the trial court on remand. The court of appeals ignored the law of the case announced by the Oklahoma supreme court and vacated the judgment without review. A litigant's property interest in an award of treble damages should be afforded the same due process protection under the Due Process cases decided by this Court as a litigant's obligation to pay a certain amount of punitive damages.

In *Boddie v. Connecticut*, 401 U.S. 371 (1971), the Court made the following observations regarding the significance of its decisions based on the principle of due process of law:

> American society, of course, bottoms its systematic definition of individual rights and duties, as well as its machinery for dispute settlement, not on custom or the will of strategically placed individuals, but on the common-law model. It is to courts, or other quasi-judicial official bodies, that we ultimately look for the implementation of a regularized, orderly process of dispute settlement. Within this framework, those who wrote our original Constitution, in the Fifth Amendment, and later those who drafted the Fourteenth Amendment, recognized the centrality of the concept of due process in the operation of this system. Without this guarantee that one may not be

> deprived of his rights, neither liberty nor property, without due process of law, the State's monopoly over techniques for binding conflict resolution could hardly be said to be acceptable under our scheme of things. Only by providing that the social enforcement mechanism must function strictly within these bounds can we hope to maintain an ordered society that is also just. It is upon this premise that this Court has through years of adjudication put flesh upon the due process principle.

In *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 313 (1950) the Court stated that due process requires the opportunity for a hearing that is appropriate to the nature of the case. In the Maxwells' case, review of the substantive findings of the trial court on remand in light of the new standard of proof announced by the Oklahoma supreme court in the case is the process that is due.

II. THE COURT OF APPEALS FAILED TO REVIEW THE CASE IN LIGHT OF THE RULING OF THE OKLAHOMA SUPREME COURT

History is replete with instances in which this Court, as well as other appellate courts, have remanded cases to lower courts to correct an error of law, reconsider the case in light of the appropriate burden of proof, or review an award of exemplary damages after new standards for the awarding of such damages have been announced. Following are examples:

In *Federal Comm'n v. Broadcasting Co.*, 309 U.S. 134, 145 (1939), the Court stated, "On review the Court may thus correct errors of law and on remand the Commission is bound to act upon the correction."

In *National Assn. of Greeting Card Pubs. v. USPS*, 462 U.S. 810 (1983), a case related to the Postal Reorganization Act, the Court remanded the case because the rates at issue were established according to the District of Columbia Circuit's erroneous view of the Act.

In *Wilson v. Seiter*, 501 U.S. 294 (1991), this Court found that the court of appeals had erred in considering the defendant's conduct under the standard of "behavior marked by persistent malicious cruelty" instead of the standard of "deliberate indifference." Because it was conceivable that the appeals court would have reached a different disposition under the correct standard, this Court remanded the case for reconsideration.

In *Consolidated Rail Corp. v. Gottshall*, 114 S.Ct. 2396 (1994), the Third Circuit applied the wrong standard for evaluating claims for negligent infliction of emotional distress and this Court reversed the judgment and remanded the case for reconsideration under the zone of danger test announced in the case.

In *H.C. Hanson v. American National Bank & Trust Company*, 844 S.W.2d 408 (Ky. 1992), certiorari granted and judgment vacated by 113 S.Ct. 3029 (1993), the United States Supreme Court vacated the judgment and remanded the case to

the Supreme Court of the State of Kentucky for further consideration in light of the decision of this Court on the issue of the proper standard for an award of exemplary damages as set forth in *TXO Production Corp. v. Alliance Resources Corp.*, 113 S.Ct. 2711 (1993).

In *Johnson v. Hugo's Skateway*, 949 F.2d 1338 (4th Cir. 1991), on rehearing, 974 F.2d 1408, the appellate court remanded the case to the trial court for further consideration in light of the factors approved by this Court for determining the appropriateness of exemplary damages as set forth in *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991).[6]

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[6]Following are cases in which the United States Supreme Court has remanded cases for further consideration based on the new standards pronounced by the Court for the award of exemplary damages.

Clayton Brokerage Co. of St. Louis, Inc. v. Jordan, 499 U.S. 914 (1991). Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Pacific Mut. Life Ins. Co. v. Haslip, ante.*, p. 1. Reported below: 861 F.2d 172 (8th Cir. 1988).

Reserve Life Insurance Co. v. Eichenseer, 499 U.S. 914 (1991). Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Pacific Mut. Life Ins. Co. v. Haslip, ante.*, p. 1. Reported below: 881 F.2d 1355 (5th Cir. 1989).

Hospital Authority of Gwinnett County, Georgia, v. Jones, 499 U.S. 914 (1991). Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Pacific Mut. Life Ins. Co. v. Haslip, ante.*, p. 1. Reported below: 259 Ga. 759, 386 S.E.2d 120 (1989).

In the recent case of *BMW of North America, Inc., v. Ira Gore, Jr.,* No. 94-896, another case in which the Court considered an award of exemplary damages, this Court remanded the case of *OXY USA, Inc., v. Continental Trend Resources, Inc.,* No. 94-1838, to the Tenth Circuit for consideration in light of the holding in the *BMW* case.

In the case of *Robertson Oil Co., Inc. v. Phillips Petroleum Co.*, 14 F.3d 373 (8th Cir. 1993) cert. denied, 114 S.Ct. 2120 (1994), the court explained the necessity of reviewing a judgment in light of the criteria approved by the higher courts. In *Robertson*, an award of punitive damages was reviewed by the appellate court four times before the final determination was made and certiorari was denied by the

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Church of Scientology of California v. Wollersheim, 499 U.S. 914 (1991), Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Pacific Mut. Life Ins. Co. v. Haslip, ante.*, p. 1. Reported below: 212 Cal. App.3. 872, 260 Cal.Rptr. 331 (1989).

Portec, Inc. v. The Post Office, 499 U.S. 915 (1991). Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Pacific Mut. Life Ins. Co. v. Haslip, ante.*, p. 1. Reported below: 913 F.2d 802 (10th Cir. 1989).

InterContinental Life Insurance Co. v. Lindblom, 499 U.S. 956 (1991). Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Pacific Mut. Life Ins. Co. v. Haslip, ante.*, p. 1. Reported below: 571 So.2d 1092 (Ala. 1990).

United States Supreme Court.[7] In *Robertson*, the plaintiff filed an action against the defendant oil company for fraud, negligence and interference with a business relationship. After the first trial, the case was appealed. The appellate court affirmed the judgment for actual damages on interference with a business relationship but remanded for retrial on the claims for fraud, negligence and punitive damages. At the second trial, the jury awarded $4,000,000 in punitive damages based on intentional interference with a business relationship and $4,000,000 in punitive damages based on fraud. The defendant appealed on several issues including the award of punitive damages. The United States District Court for the Eighth Circuit stated:

> Phillips argues that the punitive damages award was excessive and that, because Arkansas law has no definite standard for setting the amount of punitive damages, the award violates Phillips' due process rights. While this appeal was pending, the Supreme Court decided *Pacific Mutual Life Insurance Co. v. Haslip*, 111 S.Ct. 1032 (1991) which bears directly on Phillips' punitive damages arguments. Under *Haslip* we must evaluate both the jury instructions as to the punitive damages award

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[7] *Robertson Oil Co. v. Phillips Petroleum Co.*, 14 F.2d 360 (8th Cir. 1992); *Robertson Oil Co. v. Phillips Petroleum Co.*, 871 F.2d 1368 (8th Cir. 1989); *Robertson Oil Co. v. Phillips Petroleum Co.*, 930 F.2d 1342 (8th Cir. 1991).

> and the adequacy of judicial review of the jury's award.
>
> . . .
>
> *Haslip* also stresses the importance of the trial and appellate courts' roles in scrutinizing punitive damages awards. In this case, Phillips filed a motion for remittitur, which the district court denied summarily. *We are thus unable to evaluate the adequacy of the district court's review of the award. In light of the intervening decisions in Haslip, together with the Supreme Court's actions in remanding numerous cases for reconsideration in light of Haslip, we deem it advisable to remand for the district court to articulate its analysis under Arkansas law and to review the award under the criteria approved in Haslip, as well as principles enumerated in the Arkansas cases.* (emphasis added)

The Eighth Circuit Court of Appeals thereafter remanded the case for further consideration by the district court of the propriety of the punitive damages award.

CONCLUSION

The statement of the case now before this Court, in the matter of the Maxwells' petition for writ of certiorari to the Oklahoma court of appeals, demonstrates that the court of appeals did not consider the renewed treble damages judgment for the Maxwells in light of the new standard of proof approved by the Oklahoma supreme court in the case, despite its duty to

do so. The arbitrary decision of the court of appeals to vacate the judgment for treble damages in favor of the Maxwells without consideration of the merits does not comport with the orderly, predictable manner of resolving disputes which was described by the Court in *Boddie v. Connecticut*, *supra* at 374, as necessary for the functioning of an organized society.

> The limit of the full control which the State has in a proceeding of its courts, both in civil and criminal cases, is subject only to the qualifications that such procedure must not work a denial of fundamental rights or conflict with specific and applicable provisions of the Federal Constitution.

West v. Louisiana, 194 U.S. 258, 263 (1904). In the instant case the procedure of the court of appeals deprived the Maxwells of the common law protection of judicial review of the merits of their claims in light of the applicable law which is fundamental to due process of law as recognized by this Court.

The Maxwells respectfully request that this Court grant their Petition for Writ of Certiorari to the Court of Appeals, Division III, State of Oklahoma.

Dated: June 14, 1996

Respectfully submitted,

Allan DeVore
The DeVore Law Firm,
A Professional Corp.
1318 North Robinson
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73103
(405) 232-4997

APPENDIX

APPENDIX A

IN THE SUPREME COURT
STATE OF OKLAHOMA
Wednesday, March 20, 1996

THE CLERK IS DIRECTED TO ISSUE THE FOLLOWING ORDERS:

[The rulings in other non-related cases have been omitted.]

84,145 (consolidated with 84,548) Chester Maxwell, Grace Maxwell Brown et al., v. Samson Resources Company. **Certiorari denied.**
CONCUR: Hodges, Lavender, Simms, Hargrave, Summers, JJ.
CONCUR BY REASON OF STARE DECISIS: Watts, JJ.
DISSENT: Wilson, C.J., Kauger, V.C.J., Opala, J.

/s/ Yvonne Kauger
VICE CHIEF JUSTICE

APPENDIX B

NOT FOR PUBLICATION
IN THE COURT OF APPEALS
OF THE STATE OF OKLAHOMA

DIVISION NO. III

CHESTER MAXWELL, GRACE MAXWELL BROWN, JEWELL E. CAUDLE, WAUNETTE JOHNSON, JAMES A. MAXWELL, PATSY DAVENPORT and BILL MAXWELL,	)	
Appellees/ Counter-Appellants,	)	
vs.	)	Case No. 84,145 (Cons. with 84,548)
SAMSON RESOURCES COMPANY,	)	
Appellant/ Counter-Appellee.	)	

Filed
October 24, 1995

APPEAL FROM THE DISTRICT COURT
OF PITTSBURG COUNTY, OKLAHOMA

HONORABLE ROBERT A. LAYDEN, JUDGE

VACATED IN PART, REVERSED IN PART and REMANDED WITH DIRECTIONS

James M. Chaney,
Matthew L. Standard,
Oklahoma City, Oklahoma, For Appellant,

Allan DeVore,
Marjorie Ramana,
Oklahoma City, Oklahoma, For Appellees.

MEMORANDUM OPINION

Opinion by Stewart M. Hunter, Presiding Judge:

The first time Samson Resources Company appealed from the trial court's order, the Oklahoma Supreme Court affirmed the award of compensatory damages in favor of Appellees, collectively called "Maxwell," reversed the award of treble damages in favor of Maxwell for the reason that the trial court did not make findings of wrongfulness and modified the judgment for annual, rather than monthly, computation of interest. ***Maxwell v. Samson Resources, Inc.***, 848 P.2d 1166 (Okla. 1993) (***Maxwell I***). The ***Maxwell I*** court, at 1174,

reversed the judgment of the trial court and remanded the case "for further proceedings consistent with this opinion."

Upon remand, and over Samson's objection, the court reviewed the evidence from the trial held in 1988, received legal arguments of the parties and made findings of wrongfulness on Samson's part. Despite the fact that ***Maxwell I*** did not modify or reverse the trial court's judgment of compensatory damages awarded to Appellees, but only the way the interest on that judgment was calculated, the trial court rendered judgment in favor of Appellees for actual damages resulting from unpaid working interest revenues through February 1988 production from the well in question, together with interest on that production and interest on late paid royalties through February 1988 production, with all interest computation made through September 20, 1993 for a total actual damages award in the amount of $598,957.93. The trial court then reinstated treble damages against Samson pursuant

to 52 O.S. 1991 §540 (repealed in 1992); found that Appellees were not entitled to postjudgment interest after the date of the tender on May 12, 1993; found that the Supreme Court reversed the trial court and that, therefor, interest should be calculated, and damages trebled based on actual damages and interest as of the date of judgment - September 20, 1993, the date of the evidentiary hearing on whether Samson's conduct was such as to entitle Appellees to recover treble damages. The trial court also allowed Maxwell additional interest on the judgment beginning July 15, 1994, at the post-judgment interest rate.

APPEAL

Having read ***Maxwell I***, we find the court committed fundamental error when it revisited the treble damages issue. ***Maxwell I***, being the opinion and order of the Oklahoma Supreme Court, is the law of that case. In pertinent part, the ***Maxwell I*** court stated, at p. 1173:

> We need not determine at this time what degree of wrongful intent is necessary to warrant treble damages under §547 because the trial court made no finding of wrongful intent or motive for us to review. The trial court noted that he was uncertain as to any motive or intent on Samson's part, and a specific finding of wrongful intent, wrongful motive, willfulness or wantonness was never memorialized in the Journal Entry of Judgment. There being no factual finding upon which to base a ruling, we must hold that treble damages were improperly imposed on Samson. Hence, the trial court erred in trebling the damages where no findings of wrongfulness were made, and that *portion of the trial court's judgment granting treble damages is reversed.* (Emphases added.)

Clearly, the Supreme Court's final order on the part of the judgment which awarded treble damages in favor of Appellees, was a reversal. Had the Supreme Court meant to remand the treble damages part of the judgment for the court to make findings of fault, it would have made that order. The final paragraph in ***Maxwell I*** states that the "judgment of the trial court is REVERSED and the case is REMANDED for further proceedings consistent with opinion." The proceedings

consistent with the opinion would compel the trial court to enter a corrected judgment showing the unmodified amount of compensatory damages; computing the interest annually and omitting the treble damages award. For this reason, we vacate the trial court's judgment insofar as it attempted to award treble damages against Appellant. Because we find that the judgment awarding treble damages must be vacated, we decline to address Appellant's other arguments on the treble damages issue.

COUNTER APPEAL

The compensatory damages part of the original judgment was left intact by the Supreme Court in ***Maxwell I***, modified only as to computing interest on an annual basis. The day the judgment occurred, therefor, was the day the court entered its judgment awarding compensatory damages to Appellees, May 27, 1988. When a judgment is affirmed on appeal or an award remitted, the date of judgment is that of the

day the trial court entered judgment. In ***Nalley v. Kellwood Co.***, 867 P.2d 1336, 1339-40 (Okl. App. 1993), where the appellate court affirmed the actual damages part of the judgment and remitted the punitive damages part, the appellate court ordered the judgment bear interest "from the date of judgment." We therefor reverse the trial court's attempted resetting of the judgment date from May 27, 1988 to September 20, 1994. The judgment date is May 27, 1988. Prejudgment interest at the rate of 12% per annum, pursuant to 52 O.S. §540(D) (now amended), calculated annually, accrued until May 27, 1988. Postjudgment interest, calculated at the statutory rate, accumulated until the date of Appellant's tender, May 12, 1993.

For those reasons, we vacate the treble damages award and we reverse the trial court's setting of the judgment date. We order that the judgment date for the award of compensatory damages, affirmed on appeal in ***Maxwell I***, is the date the trial

court entered its judgment, May 27, 1988. The case is remanded to the trial court with specific directions to vacate the treble damage award and reinstate the compensatory damage award, assessing interest on the compensatory damage award at 12% until May 27, 1988 and at the statutory postjudgment interest rate until May 12, 1988.

Appellees/Counter-Appellants' motion for appeal-related attorney fees and costs is denied.

VACATED IN PART, REVERSED IN PART AND REMANDED WITH DIRECTIONS.

ADAMS, J., and HANSEN, J., concur.

APPENDIX C

IN THE DISTRICT COURT OF PITTSBURG COUNTY
STATE OF OKLAHOMA

CHESTER MAXWELL, GRACE MAXWELL BROWN, JEWELL E. CAUDLE, WAUNETTE JOHNSON, JAMES A. MAXWELL, PATSY DAVENPORT and BILL MAXWELL,	)	
Plaintiffs,	)	Case No. 87-159
vs.	)	
SAMSON RESOURCES COMPANY, PREMIER GAS COMPANY, ARKLA ENERGY RESOURCES, MID-CONTINENT GAS COMPANY,	)	
Defendants.	)	

REPORTER'S TRANSCRIPT OF TRIAL PROCEEDINGS*

HAD ON THE 16TH DAY OF MAY, 1988

PITTSBURG COUNTY COURTHOUSE

MCALESTER, OKLAHOMA

*pp. 301; 304.

BEFORE: THE HONORABLE ROBERT A. LAYDEN
DISTRICT JUDGE

* * *

THE COURT: Basically I find that the plaintiffs are entitled to share ratably in the production from this well, and that the Defendant Samson is liable to the Plaintiffs for the amounts owed on the Plaintiff's percentage interest, working interest in the well.

It's a difficult question as to whether Samson made a honest mistake or was making a deliberate effort to cheat the Plaintiffs. It appears to me that the Defendant Samson did not make payments or acknowledge the debt in an effort to purchaes (sic) the lease from the Plaintiffs.

The Court really doesn't have to decide on that, as the indebtedness is the same either way.

* * *

The Court finds that pursuant to Title 52, Oklahoma Statutes 547, that the Plaintiffs' are entitled to recover three fold damages.

* * *

APPENDIX D

IN THE DISTRICT COURT 18TH JUDICIAL DISTRICT
OF PITTSBURG COUNTY, STATE OF OKLAHOMA

CHESTER MAXWELL, GRACE MAXWELL BROWN, JEWELL E. CAUDLE, WAUNETTE JOHNSON, JAMES A. MAXWELL, PATSY DAVENPORT, and BILL MAXWELL	)	
Plaintiffs,	)	
vs.	)	Case No. C-87-159
SAMSON RESOURCES COMPANY PREMIER GAS COMPANY, ARKLA ENERGY RESOURCES, MID-CONTINENT GAS COMPANY,	)	
Defendants.	)	

Filed
October 28, 1988

JOURNAL ENTRY OF JUDGMENT

Now, on this 16th day of May, 1988, this matter comes on for hearing pursuant to regular assignment, before me, the undersigned Judge of the District Court in and for Pittsburg

County, Oklahoma; plaintiffs appear by and through their attorneys, Allan DeVore and Randy Moeder, defendants Premier Gas Company and Samson Resources Company appear by and through their attorneys, Michael Parks and Jack Cannon, defendant Arkla Energy Resources appears by and through its attorney, William D. Curlee, and defendant Mid-Continent Gas Company appears by and through its attorney Mark Donaldson.

1. All parties stipulate that Samson Resources Company and Premier Gas Company, pursuant to an agreement, will indemnify Mid-Continent Gas Company for all claims by the plaintiffs. Plaintiffs stipulate that the defendants Arkla Energy Resources and Mid-Continent Gas Company's only liability to the plaintiffs is for interest on the untimely payment of royalties.

2. The Court finds that pursuant to 52 O.S. §542, the plaintiffs are entitled to judgment for their ratable share

ratably on all production from the Kinnikin #1 well from first sales through February 1988. The Court finds that pursuant to 52 O.S. §542 Samson failed to offer by written notice to the plaintiffs an election whereby Samson would seek to market the plaintiffs' ratable share of gas production. The Court finds that for the period of February 1984 through February 1988, total gross revenue less taxes from the Kinnikin #1 equaled $10,212,795.70 and that the plaintiffs are entitled to payment from Samson Resources Company for their net working interest portion of production which was $325,798.80.

3. The Court further finds that the plaintiffs are entitled to interest on the unpaid net working interest revenue at a rate of 6% for their portion of the revenues produced through May 1985 production and that the plaintiffs are entitled to interest at a rate of 12% on production produced from June 1985 through February 1988. The Court further finds that these interest calculations should be compounded monthly and that

the total interest revenue due the plaintiffs from defendant Samson Resources Company for production on the Kinnikin #1 well for the period of February 1984 through February 1988 is $119,178.87.

4. The Court further finds that the plaintiffs were never invoiced by Samson Resources Company for their portion of drilling and operating costs on the Kinnikin #1 well, which totaled to $49,969.17, for the period of May 1983 through February 1988. The Court further finds that the defendant Samson Resources Company is not entitled to an offset for interest on the uninvoiced drilling and operating expenses owed by the plaintiffs.

5. The Court further finds that defendant Samson Resources Company's actions were in violation of 52 O.S. §542 et seq. and that pursuant to 52 O.S. §547, the plaintiffs are entitled to threefold damages for injuries suffered in business or property under the provisions of these Sections.

The Court further finds that the total injury of the plaintiffs caused by the defendant Samson Resource Company includes $325,798.80 of net working interest revenue and $119,178.87 of interest on said unpaid revenue less a reduction of $49,969.17 for drilling and operating costs. The Court further finds that the plaintiffs can recover threefold damages equivalent to a total recovery of $1,185,025.71 from defendant Samson Resources Company for unpaid net working interest revenue and the interest associated with the untimely payment of said working interest revenue.

6. The Court further finds that defendant Samson Resources Company failed to make timely royalty payments to the plaintiffs for their royalty interest in the Kinnikin #1 well. Pursuant to 52 O.S. §540 the Court finds that the plaintiffs are entitled to interest on these late royalty payments from defendant Samson Resources Company at a rate of 6% production through May of 1985 and at a rate of 12% on

production thereafter with these interest rates compounded monthly. The Court further finds that the plaintiffs are entitled a recover of $8,837.88 for interest on said payments.

7. The Court further finds that the plaintiffs are entitled to a total recovery of $1,193,862.83 from the Kinnikin #1 well for the period of February 1984 through February 1988.

8. It is further ordered, adjudged and decreed that the plaintiffs can recover costs and the attorney's fees pursuant to 52 O.S. §547 and that plaintiffs should submit a schedule of costs and attorneys' fees incurred in the prosecution of this action to defendant Samson Resources Company for its approval. If Samson Resources Company contests said attorney's fees the plaintiffs shall file a motion with this Court to set fees.

IT IS SO ORDERED THIS 28th day of ~~September~~, October, 1988.

/s/ Robert A. Layden
Judge of the District Court

/s/ Mark Donaldson
Mark Donaldson
Attorney for Defendant Mid-Continent Gas Company

/s/ William D. Curlee
William D. Curlee
Attorney for Defendant Arkla Energy Resources

/s/ Randy Moeder
Allan DeVore
Randy Moeder
Attorneys for Plaintiffs

/s/ Michael Parks
Michael Parks
Attorneys for Defendant Samson Resources Company
and Premier Gas Company

APPENDIX E

IN THE COURT OF APPEALS, DIVISION 4
STATE OF OKLAHOMA

CHESTER MAXWELL, GRACE MAXWELL BROWN, JEWELL E. CAUDLE, WAUNETTE JOHNSON, JAMES A. MAXWELL, PATSY DAVENPORT, and BILL MAXWELL,	)
Appellees,	)
vs.	) No. 71,180
SAMSON RESOURCES COMPANY,	)
Appellant,	) NOT FOR PUBLICATION
and	)
PREMIER GAS COMPANY, ARKLA ENERGY RESOURCES, MID-CONTINENT GAS COMPANY,	)
Defendants.	)

Filed
February 5, 1991

APPEAL FROM THE DISTRICT COURT OF
PITTSBURG COUNTY, OKLAHOMA

Honorable Robert A. Layden, Trial Judge

Allan DeVore
Randy Moeder
The DeVore Law Firm
Oklahoma City, Oklahoma For Appellees

James A. Kirk
James M. Chaney
Kirk & Chaney
Oklahoma City, Oklahoma For Appellants

MEMORANDUM OPINION

BACON, V.C.J.

This is an appeal by appellant Samson from the application of the provisions of 52 O.S. Supp. 1990 §§540-547, imposing interest and treble damages for failure to distribute revenues to unleased interest owners for gas production from the Kinnikin No. 1 well, located in Pittsburg County.

Samson was designated operator of the Kinnikin No. 1 well located in Section 26, T-3-N, R-14-E, Pittsburg County, Oklahoma, under a joint operating agreement dated February 25, 1983. In January 1984 Samson engaged Robert Ivester, a McAlester attorney, to prepare a drilling title opinion. In that

opinion, Ivester made a requirement that, in the event of production, Samson determine what interest G.S. Maxwell owned in Section 26.

The following month, February 1984, the Kinnikin No. 1 was brought in as a producing gas well, and Samson retained a Tulsa law firm, Boesche, McDermott & Eskridge to prepare a division order title opinion. In that opinion, Samson's attorneys again advised that Samson ascertain the interest held by the estate of G.S. Maxwell in the Kinnikin No. 1. G.S. Maxwell had died intestate on February 4, 1960.

Samson, upon being advised in both title opinions to determine what interest, if any, the estate of G.S. Maxwell might own in the in the well, did nothing. In 1984 the G.S. Maxwell heirs filed a quiet title suit in the district court of Pittsburg County to judicially determine title to properties owned by their deceased father, G.S. Maxwell.

On June 5, 1985, the trial court entered a journal entry of judgment that determined that each appellee was the owner of an unleased three and one-third acres in the Kinnikin No. 1 well. The appellees retained Robert Ivester to advise Samson of their ownership and seek payment for their share of the proceeds from production. By letter dated August 30, 1985, Ivester sent Samson a copy of the judgment quieting title in the appellees to their unleased interest in the Kinnikin No. 1 well.

Samson made no effort to pay to the appellees their share of the revenue from the production of the Kinnikin No. 1. Prior to commencing this action on March 13, 1987, the appellees again contacted Samson to obtain payment, but to no avail. The parties waived a jury trial and on May 16, 1988, the trial court heard the case. At the conclusion of the hearing, the trial court found that Samson was liable to the appellees for their ratable share of the production from the Kinnikin No. 1 well.

The total amount due the appellees from Samson was $1,193,862.83. This amount was arrived at by the trial court as follows: Based on the total gas sales of $10,212,795.70, the appellees' share was $325,798.80, with interest at six percent through May 1985 production and twelve percent thereafter. The interest totalled $119,178.87, based on monthly compounding. From the combination of these two figures, the trial court subtracted the appellees' share of drilling and operating costs of $49,969.17, without interest.

The trial court made the further finding that appellees' share of production, plus interest, less appellees' share of the well costs, constituted appellees' damages and were trebled under 52 O.S. Supp. 1990 §547. To this sum was added an additional $8,837.18 for interest on late royalty payments.

It is from this judgment that Samson files this timely appeal. Three propositions of error are alleged: first, that to apply the treble damages provisions of Section 547 there must

be a findings of mens rea; second, that Section 547 violated the excessive fines due process clauses of both the United States and Oklahoma Constitutions; and third, that the trial court erred in applying the provisions of 52 O.S. Supp. 1990 §540, and 52 O.S. Supp. 1990 §§541-547.

Dispositive of the first alleged proposition of error that there must be a finding of mens rea before treble damages can be recovered is Seal v. Corporation Commission, 725 P.2d 278, 298 (Okla. 1986). In Seal, the court held that in the district court treble damages may be recovered without fault.

The second allegation of error, that the trebling of damages violates the excessive fines and due process provisions of both the state and federal constitutions, can be resolved by two cases. In Browning-Ferris Industries v. Kelco Disposal, Inc., __ U.S. __, 109 S.Ct. 2909 (1989), the Court held that the excessive fines clause of the Eighth Amendment to the U.S. Constitution does not apply to awards of punitive

damages in cases between private parties. In Seal v. Corporation Commission, 725 P.2d 288-89, the court upheld the constitutionality of 52 O.S. Supp. 1990 §§541-547 under a challenge by Seal that the Act violated the due process provisions of the federal and state constitutions.

Samson's third allegation of error is under the general heading of misinterpretation of the statutes, i.e., section 540 and sections 541-547. Appellees were owners in the well prior to July 1985. When G.S. Maxwell died intestate on February 4, 1960, his interest in Section 26 passed to his heirs. 84 O.S. 1981 §212; Smyth v. Smyth, 198 Okla. 478, 179 P.2d 920 (1947)

The trial court's judgment addressed itself to the sole issue of Samson's liability to the appellees, under section 540 and sections 541-547. The trial court did not abuse its discretion on overruling Samson's motions to amend the pretrial order several days prior to the date set for the hearing.

Section 540 provides that, where proceeds from production cannot be paid because title is not marketable, such proceeds shall earn six percent interest, and twelve percent after perfecting marketable title. Appellees' share of the production from the initial date of production until they perfected marketable title would accrue at six percent interest. These proceeds, if not paid promptly after obtaining marketable title, would earn twelve percent interest and be subject to the treble damages provision of section 547.

Damages include interest where the amount appellees were entitled to from the proceeds of the well were wrongfully withheld. 23 O.S.1981 §22; Fidelity-Phenix Fire Ins. Co. v. Board of Education, 201 Okla. 250, 204 P.2d 982, 987 (1948).

Samson is not due interest on appellees' cost of drilling the Kinnikin No. 1 well and the operating costs. Interest is not recoverable on an unliquidated account prior to judgment

fixing the precise amount due. Essley v. Mershon, 262 P.2d 417 (Okla. 1953).

The last proposition of error Samson urges that the trial court erred in compounding the interest on the withheld proceeds monthly based on usage in the oil and gas industry. Section 540 clearly provides that interest, either at six percent or twelve percent per annum shall "be compounded annually." Where a conflict exists between a statute and custom and usage, the statute prevails. Hull v. Sun Refining and Marketing Co., 789 P.2d 1272, 1279 (Okla. 1989).

That part of the judgment determining interest due under Section 540 by compounding monthly is REVERSED AND REMANDED to recompute the interest due by compounding annually. In all other respects the judgment is AFFIRMED.

RAPP, J., and STUBBLEFIELD, J., concur.

APPENDIX F

IN THE SUPREME COURT STATE OF OKLAHOMA

CHESTER MAXWELL, GRACE MAXWELL BROWN, JEWELL E. CAUDLE, WAUNETTE JOHNSON, JAMES A. MAXWELL, PATSY DAVENPORT and BILL MAXWELL,	)	
Appellees,	)	
vs.	)	Case No. 71,180
SAMSON RESOURCES COMPANY,	)	
Appellant.	)	

March 16, 1993.
As Corrected April 6, 1993.

Suit was filed by alleged owners of gas producing well seeking damages for operator's failure to pay working interest revenues. The District Court, Pittsburg County, Robert A. Layden, J., found that owners had working interest in gas producing well and were entitled to damages, prejudgment interest on revenues compounded monthly and treble damages. Operator appealed. The Court of Appeals affirmed except for ruling that interest should be compounded annually. Operator

petitioned for writ of certiorari. The Supreme Court, Simms, J., held that: (1) heirs of property owner were owners of property entitled to proceeds from gas produced from well before and after order of heirship; (2) interest was to be compounded annually, rather than monthly; and (3) treble damages could not be imposed on mere showing that revenues had not been paid, but rather, some degree of wrongful intent or motive had to be proven.

Court of Appeals vacated, trial court reversed; case remanded.

Kauger and Watt, JJ., concurred in part and dissented in part. Opala, J., concurred in parts 1, 2, and 3; dissented as to part 4.

Certiorari to the Court of Appeals, Division IV, Appeal from the District Court of Pittsburg County; Robert A. Layden, Trial Judge.

Certiorari to review opinion of Court of Appeals affirming in part and reversing in part the judgment of the district court. The trial court found that appellant, as operator of a gas producing well, was liable to appellees for revenues in the appellees' working interest in the well pursuant to 52 O.S. Supp.1983, §541-47. Under the authority of 52 O.S. Supp. 1985, §540, the trial computed prejudgment interest but erred by compounding the interest monthly. The trial court also erroneously included that interest in the amount of damages which were trebled under 52 O.S. SUPP.1983, §547. The trial court's award of treble damages was erroneously awarded.

CERTIORARI PREVIOUSLY GRANTED. COURT OF APPEALS OPINION VACATED. JUDGMENT OF THE TRIAL COURT IS REVERSED AND THE CASE IS REMANDED FOR FURTHER PROCEEDINGS. Allan DeVore, Randy Moeder, The DeVore Law Firm, Oklahoma City, for appellees. James A. Kirk, James M. Chaney, Kirk & Chaney, Oklahoma City, for appellant.

SIMMS, Justice:

Defendant below, Samson Resources Company (Samson) appeals the judgment rendered by the trial court in favor of the plaintiffs below/appellees, Chester Maxwell, Grace Maxwell Brown, Jewell E. Caudle, Waunette Johnson, James A. Maxwell, Patsy Davenport, and Bill Maxwell (the Maxwells). The trial court found that the Maxwells held a working interest in a gas-producing well and they were entitled to damages for Samson's failure as the operator of the well to pay working interest revenues to the Maxwells. The court included prejudgment interest on those revenues compounded monthly and trebled this total pursuant to 52 O.S. SUPP.1985, §540 and 52 O.S. SUPP.1983, §§541-47. The Court of Appeals affirmed the judgment except for the monthly compounding of interest, modifying interest to be compounded annually. Certiorari was granted to consider whether error occurred in the determination of damages, including the prejudgment interest and treble damages. We find the trial court erred in computing interest on a compounded monthly basis and in trebling those damages. The opinion of the Court of Appeals is vacated, the judgment of the district court reversed, and the cause remanded.

FACTS

George S. Maxwell died intestate in 1960 leaving his wife and nine children as his heirs. The appellees are either his children or grandchildren, and each is an heir. His estate, which included the property involved in this lawsuit, was never probated. In 1967, the decedent's wife, Louise Maxwell, transferred her interest in the property to Buster Maxwell, a son not a party to this action. Buster then transferred his interest in the property to F.E. Allen. Seventeen years later, the Maxwells filed a quiet title action in Pittsburg County District Court alleging they owned the property as heirs of George S. Maxwell. On June 5, 1985, the district court granted a default judgment to the Maxwells, finding they held interests in the property, including the minerals. Prior to the quiet title action, Samson and several other oil and gas companies acquired leases to drill for and produce gas from the properties adjacent to and including the Maxwell's land. Kerr-McGee Corporation obtained a lease from F.E. Allen for his one-half interest in the property, and Samson was designated the operator for the gas well in a Joint Operating Agreement dated February 25, 1983.

A drilling title opinion received by Samson in January of 1984 showed a potential title defect regarding George S. Maxwell's estate. The attorney hired to do the title opinion recommended that a forced pooling action be instituted against the successors of George S. Maxwell and that in the event the well began producing, Samson should obtain a copy of the proceedings in the estate of George S. Maxwell or a transcript of the quiet title proceedings pertaining to the interests of George S. Maxwell in the well. Samson failed to follow this recommendation.

In February of 1984, the well, designated the Kinnikin # 1, began producing, and Samson hired another law firm to prepare a division order title opinion setting forth the proper ownership for revenue distribution of the well proceeds. A letter from the opining attorneys suggested that Samson withhold payment to F.E. Allen for his share until Samson obtains a final decree or an affidavit of heirship and a copy of the will of George S. Maxwell showing his wife, Louise Maxwell, and son, Buster Maxwell, as sole heirs. In response to these title problems, Samson's employees contacted Kerr-McGee representatives who provided rental receipts from F.E. Allen showing he held at least a one-half interest in the property. Samson claims it relied upon these rental receipts and Kerr-McGee's statement that F.E. Allen was the proper owner, making no efforts of its own to clear up the title question. Samson also asserts Kerr McGee was obligated to cure the title defect as the Joint Operating Agreement contained a clause stating that "[e]ach party shall be responsible for securing curative matter and pooling amendments or agreements required in connection with leases or oil and gas interests contributed by such party." The agreement also provided that the party who contributed an interest which was lost through failure of title was responsible for curing the title or bearing the entire loss caused by it. This agreement, of course, cannot excuse Samson from its duties as operator under the provisions of the Oklahoma statutes.[1]

In August, 1985, an attorney representing the Maxwells notified Samson of the quiet title judgment and requested the Maxwells' share of the working interest revenues. Samson

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[1]Fn. 2, Infra.

refused to pay the Maxwells any proceeds from the well attributable to their interest. Rather, Samson attempted to obtain gas leases from the Maxwells covering their property. However, the Maxwells chose not to lease as they would only receive royalty payments under a lease.

In March of 1987, the Maxwells commenced this lawsuit against Samson and several other defendants. Samson agreed to indemnify the other defendants for any judgment held against them. Moreover, Samson stipulated that the Maxwells were entitled to working interest revenues and the only issue to be tried was how much revenues. Non-jury trial was had, and the trial court held in favor of the Maxwells, finding them entitled to share ratably in the production from the well.

The trial court found that gross total sales of gas were $10,991,566.52, and the Maxwells' share based upon their acreage ownership was $325,798.80. The evidence supports these findings. Hence, we will not disturb them on appeal. *Smith v. State ex rel. Department of Public Safety*, 680 P.2d 365 (Okla.1984).

Pursuant to 52 O.S. SUPP.1985, §540(A)[2], the trial court awarded interest on the sale proceeds at 6% from the date

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[2]Subsection (A) of 52 O.S. SUPP.1985, s 540 provides:

"The proceeds derived from the sale of oil or gas production from any oil or gas well shall be paid to persons legally entitled thereto, commencing no later than six (6) months after the date of first sale, and thereafter no later than sixty (60) days after the end of the calendar month within which subsequent production is sold. Such payment is to be made to persons entitled thereto by the first purchasers of such production. Provided, such purchasers may remit to the persons entitled to such proceeds from production semiannually for the aggregate of six (6) months' accumulation of monthly proceeds of amounts less than Fifteen Dollars ($15.00). Further provided, that any delay in determining the persons legally entitled to an interest in such proceeds from production caused by unmarketable title to such interest shall not affect payments to persons whose title is marketable. Provided, however, that in those instances where such proceeds cannot be paid because the title thereto is not marketable, the purchaser of such production shall cause all proceeds due such interest to earn interest at the rate of six percent (6%) per annum, until such time as the title to such interest has been perfected. Marketability of title shall be determined in accordance with the then current title examination standards of the Oklahoma Bar Association. The first purchaser shall be exempt from the provisions of this subsection and the owner of the right to drill and to produce under an oil and gas lease or force pooling order shall be substituted for the first purchaser therein where the owner and purchaser have entered into arrangements where the proceeds are paid by the purchaser to the owner who assumes the responsibility of paying the proceeds to persons legally entitled thereto."

of first sales until May of 1985 on the grounds that title to the property did not become marketable until May 5, 1985 when the quiet title judgment was rendered. From May, 1985, and forward, interest was computed at 12% under 52 O.S. Supp. 1985, §540(B).[3] These interest figures were calculated on the basis of *monthly* compounding for a total interest figure of $119,178.87.

The trial court then gave Samson a set-off of $49,969.17 for the Maxwell's share of the costs and expenses of the well. No interest was tacked onto this amount because interest on costs and expenses is normally calculated from the date of billing. Since Samson never billed the Maxwell's for their share of the costs and expenses, the trial court disallowed any interest on the Maxwells' share of costs. Thus, the total working interest revenue damages award was $395,008.50.

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[3]Subsection (B) of 52 O.S. SUPP.1985, s 540 provides: "Any said first purchasers or owner of the right to drill and produce substituted for the first purchaser as provided herein that violates this act shall be liable to the persons legally entitled to the proceeds from production for the unpaid amount of such proceeds with interest thereon at the rate of twelve percent (12%) per annum, calculated from date of first sale."

Pursuant to 52 O.S. SUPP.1983, §547,[4] the trial court trebled the working interest damages for a total of $1,185,025.50. Additionally, the trial court adjudged Samson liable to the Maxwells for $8,837.18 in interest on late royalty payments as well.

THE "SWEETHEART GAS BILL"

Samson argues several propositions of error regarding the trial court's interpretation and application of relevant statutes. A brief review of these statutes, 52 O.S. SUPP. 1985, §540 and 52 O.S. SUPP.1983, §§541-47 is necessary before considering Samson's arguments. Sections 541 through 547 were enacted together by the legislature as one act which has

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[4]Title 52 O.S. SUPP.1983, §547 provides:

"The Corporation Commission is herein empowered to promulgate rules and regulations by which the purpose of this act shall be administered, including the power to establish and enforce penalties for violations thereof. Such power shall supplement the existing authority of the Corporation Commission to provide for a ratable taking of gas to protect the correlative rights of those entitled to take from a common reservoir or common source of supply, including the exercising of the authority to enforce balancing in kind. Such power shall not preclude the remedies available through the district courts as provided by existing law nor preclude the right, herewith granted, of any owner who is injured in business or property by any other owner in the well by reason of any action in violation of the provisions of this act to sue in the courts of this state and to recover threefold the damages so sustained, the costs of the suit, and reasonable attorneys fees to be fixed by the court."

come to be known as the "Sweetheart Gas Bill."[5] The purpose of the bill, as stated in §541, is to protect the rights and correlative rights of all interest owners of natural gas wells, affording each the opportunity to extract and sell their proportionate share of gas.

Section 542 entitles each owner of a mineral interest in a gas producing well to share ratably in the revenues from the sale of the gas produced by the well and requires the operator of the well to give written notice to the owners of their right to have the operator market their gas for them. Similarly, §§543-45 govern the sales of gas under contracts and the accounting of gas sales, and §545 directs the distribution of proceeds from sales under the provisions of §540.

Section 540 calls for proceeds from the sale of gas to be paid to persons legally entitled thereto within six months after the date of first sale. Proceeds from any subsequent sales must be paid to the owners within sixty days of the end of the calendar month within which the gas was sold. The provision further reads:

"Provided, however, that in those instances where such proceeds cannot be paid because the title thereto is not marketable, the purchasers of such production shall cause all proceeds due such interest to earn interest at the rate of six

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[5]In 1992, the Oklahoma Legislature enacted the "Natural Gas Market Sharing Act." *See* 1992 Okla. Sess. Laws, ch. 190, ss 18-29. This act amended and recodified the provisions of the "Sweetheart Gas Bill" and added many more provisions to govern gas sales. *See, generally, Hoefling, Oklahoma's New Natural Gas Market Sharing Act*, 63 Okla.B.J. 2245 (July 25, 1992).

percent (6%) per annum, until such time as the title to such interest has been perfected." 52 O.S. SUPP.1985, §540(A). Subsection D of §540 provides for a 12% interest rate on unpaid revenues when the owners have marketable title.

I.

THE MAXWELLS WERE "OWNERS" OF THE PROPERTY

[1] Samson first argues the Maxwells were not "owners" in the gas well until July of 1985 when the district court quieted title in them. Since they were not owners in the well, Samson concludes that §542 does not apply to them and they are not entitled to proceeds from gas produced prior to that month. It is well settled that title to real property vests immediately in the heirs upon the death of an intestate. *Cassina v. Jones*, 340 P.2d 482 (Okla.1959); *Smyth v. Smyth*, 198 Okla. 478, 179 P.2d 920 (1947); *Davis v. Morgan*, 186 Okla. 30, 95 P.2d 856 (1939). Smyth further holds that although vesting immediately, "title is not absolute until determination of heirship and final distribution is had." 179 P.2d at 923 (citing *U.S. v. Drummond*, 144 F.2d 375 (10th Cir.1944), aff'd, *Drummond v. U.S.*, 324 U.S. 316, 65 S.Ct. 659, 89 L.Ed. 969 (1945)). In *U.S. v. Drummond*, the Tenth Circuit explained that although the heir is the *owner* of the property, they are not entitled to possession until all debts are satisfied and an order issued directing distribution of the property to them.

Hence, the holding in *Smyth* that title is not absolute merely means that the heir is not entitled to enjoy all of the benefits of "ownership" until final distribution. As such, under the law of descent and distribution, the Maxwells, as heirs, are considered owners of the property.

In *Seal v. Corporation Commission*, 725 P.2d 278, 293 n. 33 (Okla.1986), we construed the term "owner" as used in 52 O.S. SUPP.1983, §§542(A) and (D) to mean "parties who have a right to take their share of production in kind or to separately dispose of their share." Since the Maxwells were the rightful owners under probate law, they were entitled to the proceeds of any gas sales from the Kinnikin # 1 well after heirship was officially declared by the district court in July of 1985. Additionally, prior to the 1985 order, the Maxwells were owners although not entitled at that time to all of the benefits of ownership. Having been determined the proper heirs of the property, the Maxwells were entitled to those benefits which included proceeds from gas sales from the Kinnikin # 1 well both before and after the order of heirship.

II.

THE TRIAL COURT DID NOT ERR IN FINDING SAMSON LIABLE FOR GAS SALES FROM THE WELL

[2] Next, Samson claims the trial court improperly awarded damages, interest and penalties to proceeds paid or payable pursuant to a contract between Arkla Energy Resources and Kerr McGee. Arkla contracted with Kerr McGee to purchase gas from the well, and Samson contends that some of the damages awarded were attributable to revenues paid by Arkla pursuant to this contract from March, 1985 through February, 1988. Samson fails to cite to any authority showing error by the trial court. Evidence upon this issue was presented, and the evidence tends to support the trial court's finding. Hence, we decline to disturb the trial court's ruling on appeal. *Smith v. State ex rel. Department of Public Safety*, 680 P.2d 365 (Okla.1984).

III.
UNDER SECTION 540, INTEREST SHOULD BE COMPOUNDED ANNUALLY RATHER THAN MONTHLY

[3] The Court of Appeals reversed and remanded the trial court's judgment as to the way interest should be computed. Samson does not take issue with the Court of Appeal's holding that interest is to be computed on a compounded *yearly* basis. Therefore, we need not address the issue and merely hold that interest under §540 is to be compounded annually rather than monthly. Because the trial court compounded interest monthly, the judgment is modified to compute interest by compounding *annually*.

IV.
THE TREBLE DAMAGES PROVISION OF SECTION 547 MAY NOT BE IMPOSED WITHOUT SOME EVIDENCE OF WRONGFUL INTENT

[4] Samson next asserts *Morissette v. United States*, 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288 (1952), requires a finding of wrongful intent before treble damages may be imposed. In *Morissette*, the United States Supreme Court overturned a conviction for "knowingly converting" United States property because the trial court refused to submit "intent" as an element of the crime to the jury. Because *Morissette* involved a criminal conviction as opposed to penalty damages as this case does, we will not base our decision upon the rationale of that decision. Rather, we look to the common law and statutes analogous to §547 for guidance.

Section 547 states that the power afforded to the Corporation Commission to promulgate rules to administer the act:

"*shall not preclude* the remedies available through the district courts as provided by existing law nor preclude in the well by reason of any action *in violation of the provisions of this act* to sue in the courts of this state and to *recover threefold the damages so sustained*, the costs of the suit, and reasonable attorneys fees to be fixed by the court." (Emphasis added)[6]

[5] Section 547 authorizes the district court to impose a penalty of three times the amount of damages actually sustained. As such, the statute is penal in nature and must be strictly construed. *State ex rel. Thompson v. Ekberg*, 613 P.2d 466 (Okla.1980). *See also Wagoner v. Bennett*, 814 P.2d 476 (Okla.1991) (statute allowing double damages for wrongful eviction was penal in nature); *Slocum v. Phillips Petroleum Co.*, 678 P.2d 716 (Okla.1983) (exemplary damages are highly penal and punishment thereof should not be lightly imposed).

In the case at bar, the Oklahoma Court of Appeals determined that treble damages were permissible regardless of any evidence of wrongful intent. This conclusion came from their reading of language this Court used in *Seal v. Corporation Commission*, 725 P.2d 278 (Okla.1986). In *Seal*,

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[6]After the 1992 amendments and recodification, §547 is now found at 52 O.S. SUPP.1992, §581.10. The amendment *eliminates the treble damages provision* so that now an aggrieved owner *may only recover actual damages* sustained against an owner or producer who violates the provisions of the act.

we held that the Sweetheart Gas Bill was constitutional, further noting:

"The practical effect of different standards for measuring liability in district court and the Commission would force parties to seek their remedies in district court where treble damages may be recovered without fault." 725 P.2d at 298.

The Court of Appeals interpreted this language to mean that the trebling provision of §547 is to be imposed regardless of any fault or motive on the part of the well operator. However, the holding of *Seal* does not support such a construction. Seal specifically struck down a rule promulgated by the Corporation Commission pursuant to authority given by §547. The rule was disallowed because it required a mineral interest owner to prove that its loss was the result of the operator's "gross negligence or willful misconduct" in order to win any damages in a suit against the operator. Since the rule imposed a standard for measuring liability in the Corporation Commission which did not exist in the district court under §547, it was declared invalid. The above-quoted language which implies that §547 imposes treble damages regardless of fault was *dicta* and was not meant as an interpretation of the grant of treble damages in §547. Rather, it set forth the distinction between the Corporation Commission's rigorous standard and the statute's lack of an explicit standard.

[6] Section 547 does not automatically award treble damages to an owner on a mere showing that the operator owes him revenues. Rather, it prohibits the Corporation Commission from promulgating rules which are more restrictive than the owner's right to recover treble damages under §547. Although the statute gives no indication as to what circumstances warrant recovery of treble damages, we cannot assume the legislature

intended for treble damages to be imposed without some finding of intentional or wrongful conduct. Indeed, some form of wrongful intent or conduct must be shown to award treble damages as an example or punishment. *See Oller v. Hicks*, 441 P.2d 356, 360 (Okla.1967), which holds:

"The basis for allowance of punitive damages rests upon the principle that they are allowed as a punishment for the benefit of society as a restraint upon the transgressor, and a warning and example serving as a deterrent to commission of like offenses in the future.... When a defendant's conduct is such as to amount to fraud, oppression or malice, or the act is wilfully and wantonly done with criminal indifference to the plaintiff's rights, exemplary damages are allowable." (Citations omitted).

Exemplary damages "are designed to discourage, among other things, the wilful and wanton invasion or disregard of the rights of others." *Main v. Levine*, 189 Okla. 564, 118 P.2d 252, 255 (1941). The U.S. Supreme Court defines punitive damages as "private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350, 94 S.Ct. 2997, 3012, 41 L.Ed.2d 789 (1974). Moreover, 22 Am.Jur.2d *Damages* §816 (1988) explains the application of treble damages as follows:

"Statutory double or treble damages, like exemplary damages generally, are confined to cases where some element of recklessness, wantonness, willfulness, or evil design entered into the act when it was committed.

"Several Oklahoma statutes provide for exemplary damages. Title 23 O.S. 1991, §9 allows exemplary damages where the defendant's conduct evinces "a wanton or reckless

disregard for the rights of another, "among other things. Under s 9, this Court has upheld exemplary damages awards for recklessness, *Sunray DX Oil Co. v. Brown*, 477 P.2d 67 (Okla.1970), and for gross negligence, *Pennsylvania Glass Sand Corp. of Oklahoma v. Ozmet*, 434 P.2d 893 (Okla.1967). Numerous other decisions, some relying upon §9, have held that some form of wrongful intent or recklessness is necessary before exemplary damages are allowed.

In strictly construing 23 O.S.1931, §71, which grants treble damages to a person who is forcibly ejected or excluded from the possession of real property, this Court reversed a judgment for plaintiff because the instructions given provided for recovery of treble damages on a mere showing of ejectment. *Crow v. Davidson*, 186 Okla. 84, 96 P.2d 70 (1939). We noted that a showing of "force" was necessary to warrant treble damages and reversed the judgment where the instructions did not include the element of force.

Another statute, 23 O.S. 1991, §72 provides for treble damages for wrongful injuries to timber, trees or underwood, "except where the trespass was casual and involuntary." In *Robinson v. Spittler*, 191 Okla. 278, 129 P.2d 181 (1942), this Court construed §72 to allow treble damages against a defendant who conveyed standing timber to another without the consent of the owner when that defendant made the conveyance "with full knowledge" that he neither owned the timber or had authority to convey. 129 P.2d at 184. Even though the defendant did not enter onto the land and cut the timber down, he was held liable under the statute for his wrongful actions. Thus, under §72, the trier of fact must specifically find intent on the defendant's part in trespassing and damaging timber.

These cases are just a few examples of statutes allowing multiple or exemplary damages where one person's actions cause damage to another person's property or violates their rights. In each, some degree of wrongful intent was necessary in order to warrant the exemplary damages. Our construction of §547 must require no less.

Therefore, based upon considerations of fundamental fairness in penalizing one for their actions, and giving due weight to the legislature's recent repeal of multiple damages in cases such as this one, we hold that treble damages may not be imposed under §547 on a mere showing that revenues have not been paid from the proceeds of gas sales. Rather, some degree of wrongful intent or motive must be proven by an owner in a gas well to recover threefold damages.

[7] We need not determine at this time what degree of wrongful intent is necessary to warrant treble damages under §547 because the trial court made no finding of wrongful intent or motive for us to review. The trial court noted that he was uncertain as to any motive or intent on Samson's part, and a specific finding of wrongful intent, wrongful motive, willfulness or wantonness was never memorialized in the Journal Entry of Judgment. There being no factual finding upon which to base a ruling, we must hold that treble damages were improperly imposed on Samson. Hence, the trial court erred in trebling the damages where no findings of wrongfulness were made, and that portion of the trial court's judgment granting treble damages is reversed. Since we are reversing the treble damages, we need not address other propositions concerning the constitutionality of §547 or the imposition of treble damages upon prejudgment interest allowed under §540. Appellee's motion to dismiss this appeal

for failure by Samson to timely assure the record on appeal was ready for submission is DENIED. For the above and foregoing reasons, the opinion of the Court of Appeals is VACATED, the judgment of the trial court is REVERSED and the case is REMANDED for further proceedings consistent with this opinion.

HODGES, C.J., LAVENDER, V.C.J., and HARGRAVE, ALMA WILSON and SUMMERS, JJ., concur.

KAUGER, WATT, JJ., concur in part, dissent in part.

OPALA, J., concurs in 1, 2, and 3; dissents as to 4.

APPENDIX G

CHESTER MAXWELL, ET AL.,	)	
	)	
v.	)	C-87-159
	)	
SAMSON RESOURCES COMPANY, ET AL.	)	

Filed
July 18, 1994

MEMORANDUM DECISION

This Court has reviewed the pleadings, evidence presented and the briefs submitted to the Court.

The Court entered an order in this case in 1988, it was appealed and reversed. The Supreme Court affirmed certain parts of the decision of the Trial Court and it seems unnecessary for this Court to recalculate or discuss the arguments presented by the parties concerning those issues.

The Supreme Court affirmed that the plaintiffs, as heirs, are considered to be the owners of the property. The Trial Court awarded damages, interest and penalties to proceeds paid

or payable pursuant to a contract between Arkla and Kerr-McGee and the Supreme Court Affirmed the finding. The Court believes that plaintiff, at the time of the last trial, correctly summarized the judgment previously entered by the Trial Court and affirmed by the Supreme Court as shown by plaintiff's exhibit 4A, and these calculations will be a part of this order.

The Supreme Court reversed the Trial Court as to the way interest should be computed and in the Journal Entry of Judgment herein, interest should be computed by being compounded annually rather than monthly. The Supreme Court reversed the Trial Court in it's assessment of treble damages against the defendant. Title 52 O.S. §547 (now repealed, but in effect at the time of the trial of this case) provided the right "of any owner who is injured in business or property by any other owner in the well by reason of any action in violation of the provisions of this act to sue in the Courts of

this State and to recover three fold damages so sustained. . . ." This led the Court to the incorrect conclusion that a violation of the provisions of the act Title 52 O.S. §547, et seq, would entitle the injured party to recover three fold damages. This was reinforced by the wording in Seal v. Corporation Commission, 725 P.2d 278, where it was suggested that parties could seek their remedies in District Court "where treble damages may be recovered without fault." Of course, this is dicta and the Court did not mean that in District Courts treble damages could be recovered without fault.

In reversing the Trial Court, the Supreme Court stated that the "Trial Court erred in trebling the damages where no findings of wrongfulness were made, and that portion of the Trial Court's judgment granting treble damages is reversed." The Trial Court finds at this time that the sole issue to be determined is whether defendants were guilty of wrongfulness that would entitle the plaintiffs to recover treble damages.

Obviously, other questions have risen as to specific amounts involved but those may be resolved by stipulation of the parties or by further presentation to the Court.

A primary issue raised by the defendants is that since §547 has now been repealed and the provisions for treble damages no longer a part of the law of this state, there is no longer a basis for punitive damages as the purpose of punishment and to serve as an example to deter the defendant and others is not applicable since the repeal of the statute. The Court previously ordered and repeats at this time that the statute was in effect at the time of the contractual proceedings and at the time of the first trial in this case, that the amendment to the statute deleting the treble damages is prospective, being a substantive right not a procedural right, and that the Court will rule on the basis of the statute in effect at the time of the trial.

In the original trial the Trial Court made no finding of wrongful intent or motive on the part of the defendant as the Court incorrectly believed that such a finding was unnecessary.

Extensive evidence was presented as to the acts of the parties and their dealings with each other at the original hearing and the Court has reviewed the testimony presented at that time. Much of that testimony, particularly as it dealt with any wrongful actions, was repeated in the rehearing of this case and extensive arguments were made based on the testimony presented.

This court does not deem it necessary to repeat and analyze the evidence presented. The Court noted in its' findings in the original trial that there was a question if Samson had made an honest mistake or a deliberate effort to cheat; the Court stated in open Court that "it seems to me that the defendant (Samson) did not make payments or acknowledge the debt in an effort to purchase the lease. . . ." the Court notes

that in 1986 Samson attempted to lease the property from the plaintiffs while improperly withholding proceeds from production. the Trial Court is particularly troubled by the defendants efforts to obtain a lease from the plaintiffs while withholding vital information concerning the value of the property. The Court believes that Samson deliberately withheld facts as to the productivity of the well at a time when the well had already produced sufficient revenue to cover all costs of the well.

The evidence lends credence to plaintiffs' charge that Samson willfully disregarded its statutory duty to market the plaintiffs' gas and to pay the plaintiffs the proceeds, and that Samson made an effort to keep for itself the revenue attributable to plaintiffs' working interest. There was evidence that employees of Samson did not know the economic value of the Kinnikin well when it was seeking to lease it from the

plaintiffs, but the Court can only conclude that there was a deliberate avoidance of knowledge.

A problem concerning the title to the property was raised by title opinion as early as 1983 and 1984, which should have caused Samson to investigate. The possible interest of heirs in the property was brought up in a title opinion in January, 1983, which Samson ignored; actually, it was not an unusual or complex problem and could have been resolved with little effort or expense. Samson was told by two different attorneys that GS Maxwell was deceased and a filed mineral deed referred to "GS Maxwell deceased." Again, in its forced pooling attempt, the defendant ignored this information and its affidavit stated that it did not know the whereabouts of Maxwell. Defendants' land man explained this simply as the "standard language" used in an affidavit of non-mailing.

The statute involved, §547, does not state what circumstances justify the recovery of treble damages and the

Supreme Court in its"s review of this case did not determine what degree of wrongful intent is necessary to warrant treble damages under §547. The Court finds under the facets in this case that Samson negotiated with the plaintiffs in bad faith, that if it was not acting with intentional misconduct it was acting with wanton disregard of the rights of the plaintiffs and deliberately avoided knowledge it would have had a duty to impart to the plaintiffs. The Court finds that the failure to pay plaintiffs for their interests in the Kinnikin well was an intentional violation of plaintiffs' rights. Defendants actions certainly fit the description of Title 23 O.S. §9 which allows exemplary damages where the conduct evinces "a wanton or reckless disregard of another."

The Court finds plaintiffs are entitled to damages as set out in the original Journal Entry of this case and orders that plaintiffs are entitled to treble damages based on the misconduct of the defendant. Interest is to be computed by

compounding annually. The Court finds that plaintiffs are not entitled to post-judgment interest on the amount that Samson unconditionally tendered to plaintiffs on May 12, 1993.

The Court finds that the Supreme Court reversed the judgment of the Trial Court; therefore, interest should be calculated, and damages trebled based on actual damages and interest as of the date of judgment: September 20, 1993. The Court finds that the interest should be calculated on the basis of 9.95 percent rather than 12 percent.

Counsel for plaintiff to prepare a proposed Journal Entry of Judgment based on the findings of this Memorandum Decision.

DATED THIS 15TH DAY OF JULY, 1994.

/s/ Robert A. Layden
Robert A. Layden, District Judge

APPENDIX H

IN THE DISTRICT COURT OF PITTSBURG COUNTY
STATE OF OKLAHOMA

CHESTER MAXWEL, GRACE MAXWELL BROWN, JEWELL E. CAUDLE, WAUNETTE JOHNSON, JAMES A. MAXWELL, PATSY DAVENPORT, and BILL MAXWELL.,	)	
Plaintiffs,	)	
vs.	)	Case No.C-87-159
SAMSON RESOURCES COMPANY,	)	
Defendant.	)	

JOURNAL ENTRY OF JUDGMENT

DATED October 5, 1994

This action was originally heard by this Court in 1988 and resulted in this Court entering judgment against Samson Resources Company on May 27, 1988. The Oklahoma Supreme Court reversed the judgment on March 16, 1993, and remanded the case to this Court for further proceedings consistent with the Supreme Court opinion. On September 20,

1993, this Court held a further evidentiary hearing on the issue of whether the defendant's conduct was such as would entitled the plaintiffs to recover treble damages. In July 15, 1994, this Court entered a Memorandum Decision finding the requisite intent by Samson Resources Company to violate plaintiffs' rights. The Court hereby incorporates the findings of fact and conclusions of law contained in said Memorandum Decision. The Court further incorpoates herein and attaches hereto plaintiffs' Exhibit "4A" as revised pursuant to the memorandum decision.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is rendered in the above-styled and numbered cause against Samson Resources Company in favor of Chester Maxwell, Grace Maxwell Brown, Jewell E. Caudle, Waunette Johnson, James A. Maxwell, Patsy Davenport, and Bill Maxwell for actual damages resulting from unpaid working interest revenues (net of drilling and operating

expenses) through February 1988 production the Kinnikin 1-26 well, together with interest on said production and interest on late paid royalties through February 1988 production, with all interest computation made through September 20, 1993, for a total actual damages award in the amount of **$598,957.93.**

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that judgment is rendered in the above-styled and numbered cause against Samson Resources Company in favor of Chester Maxwell, Grace Maxwell Brown, Jewell E. Caudle, Waunette Johnson, James A. Maxwell, Patsy Davenport, and Bill Maxwell for additional damages in the amount of **$1,172,482.92** resulting from the trebling of actual damages as they relate to the working interest of the plaintiffs in the Kinnikin 1-26 well.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the judgment herein awarded for actual damages only in the amount of $598, 957.93 has been satisfied

through payment of said amount by Samson Resources Company. Samson Resources Company is hereby granted a partial release of judgment as to actual damages only.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Chester Maxwell, Grace Maxwell Brown, Jewell E. Caudle, Waunette Johnson, James A. Maxwell, Patsy Davenport, and Bill Maxwell be awarded additional interest on the judgment herein granted, accruing beginning ~~September 20, 1993,~~ July 15, 1994, until paid, calculated at the post-judgment interest rate.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Chester Maxwell, Grace Maxwell Brown, Jewell E. Caudle, Waunette Johnson, James A. Maxwell, Patsy Davenport, and Bill Maxwell be awarded attorney's fees and costs against Samson Resources Company pursuant to 52 O.S. §§ 540 and 547. On June 18, 1993, plaintiffs submitted a Renewed Motion for Attorney's Fees requesting an attorney's

fee of $89,602.09. Plaintiffs are hereby required to submit a schedule of costs and attorney's fees incurred subsequent to said motion to Samson Resources Company for its approval. If the amount of the award of attorney's fees and costs can be agreed to by the parties, an agreed order should be submitted to this Court for execution; otherwise, plaintiffs shall notify the Court than an agreement cannot be reached and request that an evidentiary hearing be set.

IT IS SO ORDERED THIS 5TH DAY OF OCTOBER, 1994.

/s/
Judge of the District Court

APPENDIX I

IN THE COURT OF APPEALS FOR THE STATE OF OKLAHOMA

DIVISION III

CHESTER MAXWELL, GRACE MAXWELL BROWN, JEWELL E. CAUDLE, WAUNETTE JOHNSON, JAMES A. MAXWELL, PATSY DAVENPORT, and BILL MAXWELL,	)
Appellees/ Counter-Appellants,	)
vs.	)Case No. 84,145)(Cons.w/ 84,548)
SAMSON RESOURCES COMPANY,	)
Appellant/ Counter-Appellee.	)

Filed
November 13, 1995

PLAINTIFFS/APPELLEES' PETITION FOR REHEARING (AS CORRECTED 11/15/95)

[IN PERTINENT PART]

* * *

In cases in which appellate courts find that the record on appeal of an award of exemplary damages indicates there is a question as to whether the proper standard for awarding exemplary damages was followed in the trial court, it is the practice of the appellate court to remand the case for further proceedings on the matter. For example, American Natural Bank & Trust Company v. H. C. Hanson, 844 S.W.2d 408 (Ky 1992) at 113 S.Ct. 3029 (1993) in which the United States Supreme Court vacated the judgment and remanded the case to the Supreme Court of the State of Kentucky for further consideration in light of the decision of the United States Supreme Court on the issue of punitive damages in the case of TXO Production Corp. v. Alliance Resources Corp., 113 S.Ct. 2711 (1993); and Johnson v. Hugo's Skateway, 949 F.2d 1338 (4th Cir. 1991) in which the appellate court remanded the case to the trial court for further consideration in light of the factors approved by the United States Supreme Court in another case

involving punitive damages, Pacific Mutual Life Ins. Co. v. Haslip, 499 U.S. 1 (1992).

In the case of Robertson Oil Co., Inc. v. Philips Petroleum Co., 14 F.3d 373 (8th Cir. 1993) (cert. Denied, 114 S.Ct. 2120 (1994), the award of punitive damages was reviewed by the appellate court four times before the final determination was made and certiorari was denied by the United States Supreme Court.[2]

* * *

In the instant case, the award of treble damages to the Maxwells was based on the following language in the Oklahoma Statute. The first part of the statute referred to powers of the Oklahoma Corporation Commission.

> Such power shall not preclude the remedies available through the district courts as provided by existing law nor preclude the right, herewith

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[2]Robertson Oil Co. v. Philips Petroleum Co., 14 F.3d 360 (8th Cir. 1992); Robertson Oil Co. v. Phillips Petroleum Co., 871 F.2d 1368 (8th Cir. 1989); Robertson Oil Co. v. Phillips Petroleum Co., 930 F.2d 1342 (8th Cir. 1991).

> granted, of any owner who is injured in business or property by any other owner in the well by reason of any action in violation of the provisions of this act to sue in the courts of this state and to recover threefold the damages so sustained, the costs of the suit and reasonable attorneys fees to be fixed by the court.

52 Okla. Stat. §547.

In Seal v. Corporation Com'n., 725 P.2d 278 (Okla. 1986), the Oklahoma Supreme Court upheld the constitutionality of 52 Okla. Stat. §541-47 and also ruled on challenges to the rules of the Oklahoma Corporation Commission implementing the statute. In its opinion, the Court stated as follows regarding §547:

> The Commission attempts to justify Rule 6-112 by asserting such Rule has no application to district court treble damage remedies authorized by Section 547. It maintains an action before the Commission to recover on liabilities from a breach of obligations imposed by the Rules is a totally separate and distinct action from one in district court for breach of the statutory duties. We find no distinction for the Rules were promulgated to administer the purpose of the Act. The practical effect of different standards for measuring liability in district court and the

> Commission would force parties to seek their remedies in district court where treble damages may be recovered without fault. We find the standard for penalties to be enforced by the Commission for violations of the act and the Rules promulgated for its administration should be that imposed by Section 547 for district court actions.

In its opinion in this case, the Oklahoma Supreme Court referred to the discussion of the treble damage provision of the Sweetheart Gas Bill, 52 Okla. Stat. §§541-47, in the case of Seal, supra, and stated that the reference to treble damages was not meant as an interpretation of the grant of treble damages in §547. The Court observed that this Court had interpreted the language in Seal to mean that the trebling provision is imposed regardless of any fault or motive. It is not surprising that the district court was under the same impression as this Court that it was not necessary to enter a finding of fault to award treble damages under 52 Okla. Stat. §547. The decision of the trial court was based on the statement of the Oklahoma Supreme Court in Seal.

In the opinion in Maxwell, the Supreme Court clarified the statement in Seal. The Court ruled that the trial court erred in not entering the finding of wrongful intent on the part of Samson and remanded the case for further action in light of the opinion of the Court. The Maxwells have a right to appeal error of the trial court. They did not do so at the trial level because the judgment was in their favor. However, if the judgment in favor of the Maxwells is summarily vacated because the trial court erred in not entering a finding of wrongful intent, the Maxwells will be denied the judicial review to which they are entitled.

The Oklahoma Supreme Court had not clarified the standard for an award of treble damages under 52 Okla. Stat. §547, until the opinion in the Maxwell case. The action of the Oklahoma Supreme Court in remanding the case for further proceedings consistent with its opinion is in accord with similar cases remanded by the United States Supreme Court. The

Maxwells respectfully request that this Court reconsider the opinion in this case.

Respectfully submitted,

/s/ Marjorie Ramana
Marjorie Ramana
Allan DeVore
The DeVore Law Firm,
A Professional Corporation
1318 North Robinson
Oklahoma City, Oklahoma 73103
(405) 232-4997

CERTIFICATE OF MAILING

This is to certify that on the 13th day of November, 1995, a true and correct copy of the above and foregoing document was mailed, postage prepaid, to:

James M. Chaney
Matthew L. Standard
Kirk & Chaney
101 Park Avenue, Suite 800
Oklahoma City, Oklahoma 73102-7202

/s/ Marjorie Ramana
Marjorie Ramana

APPENDIX J

RELEASE FOR PUBLICATION IN THE OKLAHOMA BAR JOURNAL BY ORDER OF COURT OF APPEALS

DIVISION 3

NOVEMBER 30, 1995

THE CLERK IS DIRECTED TO ISSUE THE FOLLOWING ORDERS:

[Other non-related cases omitted.]

84,145 - Cons. W/84,548. Chester Maxwell, Grace Maxwell Brown, Jewell E. Caudle, Waunette Johnson, James A. Maxwell, Patsy Davenport and Bill Maxwell, Appellees/Counter-Appellants v. Samson Resources Company, Appellant/Counter-Appellee.

Appellees'/Counter-Appellants' Petition for Rehearing is DENIED.

DONE BY ORDER OF THE COURT OF APPEALS IN CONFERENCE this 30th day of NOVEMBER, 1995.

/s/ Stewart M. Hunter
Stewart M. Hunter,
Presiding Judge

APPENDIX K

IN THE SUPREME COURT FOR THE
STATE OF OKLAHOMA

CHESTER MAXWELL, GRACE MAXWELL BROWN, JEWELL E. CAUDLE, WAUNETTE JOHNSON, JAMES A. MAXWELL, PATSY DAVENPORT, and BILL MAXWELL,	)	
Appellees/ Counter-Appellants,	)	
v.	)	Case No. 84,145
SAMSON RESOURCES COMPANY,	)	
Appellant/ Counter-Appellee.	)	

Filed
December 22, 1995

PLAINTIFFS'/APPELLEES'
PETITION FOR WRIT OF CERTIORARI

The decision sought to be reviewed is the Memorandum Opinion of the Court of Appeals of the State of Oklahoma, Division No. III, filed on October 24, 1995, and attached hereto

as Exhibit "A". Petitioners filed a Petition for Rehearing on November 13, 1995. The Petition for Rehearing was denied by the Court of Appeals on December 5, 1995. In the Memorandum Opinion, the Court of Appeals has decided a question of substance not heretofore determined by this Court in a manner that is contrary to 52 Okla. Stat. §541-47, the Sweetheart Gas Bill, which was in effect at the time petitioners' cause of action arose, and contrary to statements made by this Court concerning said statute in the prior appeal in this case cited as Maxwell v. Samson Resources Co., 848 P.2d 1166, 1172-73 (Okla., March 16, 1993).[3]

The central question to be reviewed is whether the plaintiffs were entitled to have errors of law by the trial court corrected on remand where the Oklahoma Supreme Court announced new standards in its opinion for the award of treble

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[3]52 Okla. Stat. §547 was amended effective September 1, 1992, prior to the ruling of this Court in Samson v. Maxwell, supra, and renumbered as 52 Okla. Stat. §581.10.

damages under the Sweetheart Gas Bill and ordered the trial court to conduct additional proceedings consistent with the opinion.

STATEMENT OF QUESTION PRESENTED

In this action, plaintiffs/appellees, the heirs of George S. Maxwell, deceased, (hereinafter "the Maxwells") sued appellant Samson Resources Company (hereinafter "Samson") to recover their share of the proceeds from the sale of the production of gas from the Kinnikin #1 well located in Pittsburg County, Oklahoma. At the conclusion of the non-jury trial on May 16, 1988, the trial court ruled that the Maxwells were entitled to their proportionate share of the proceeds of production from the Kinnikin #1 well, less their share of the costs and expenses of the well, plus interest thereon. The trial court further ruled that the Maxwells were entitled to threefold damages pursuant to 52 Okla. Stat. §547. The trial court entered judgment for the Maxwells and Samson appealed. The

Court of Appeals affirmed the trial court except for the calculation of interest, which the appellate court ruled should be calculated on an annual rather than a monthly basis. This Court granted certiorari.

In Maxwell v. Samson, supra, this Court ruled that interest under 52 Okla. Stat. §540 is to be compounded annually rather than monthly and that the treble damages provisions of 52 Okla. Stat. §547 may not be imposed without some finding of conscious wrongdoing. This Court found:

> [S]ome degree of wrongful intent or motive must be proven by an owner in a gas well to recover threefold damages.
>
> We need not determine at this time what degree of wrongful intent is necessary to warrant treble damages under §547 because the trial court made no finding of wrongful intent or motive for us to review.
>
> * * *
>
> There being no factual finding upon which to base a ruling, we must hold that treble damages were improperly imposed on Samson.

Id. at 1173. This Court then directed the trial court to revisit its decision based upon the Supreme Court's opinion, stating:

> For the above and foregoing reasons, the opinion of the Court of Appeals is VACATED, the judgment of the trial court is REVERSED and the case is REMANDED for further proceedings consistent with this opinion.

After the case was remanded to the trial court, the Maxwells filed a motion asking the trial court to supplement the judgment in the case by entering a finding of wrongful intent on the part of Samson based on the evidence presented at the original trial. The Maxwells had initially asked the trial court to enter such a finding in the original journal entry of judgment, but at that time Judge Layden stated that he did not believe such a finding was required under the statute, based upon a statement to that effect in Seal v. Corporation Com'n., 725 P.2d 278 (Okla. 1986).

Samson objected .to the Maxwells' motion to supplement the judgment. When the trial court set a hearing on

the matter, Samson insisted that it be allowed to introduce additional testimony on the issue of willful intent on the part of Samson. On September 20, 1993, the trial court conducted a further evidentiary hearing on the issue of whether Samson's conduct demonstrated wrongful intent or motive. On July 15, 1994, the trial court ruled that Samson's failure to pay the Maxwells for their interest in the Kinnikin well was an intentional violation of the Maxwells' rights which demonstrated the requisite wrongful intent entitling the Maxwells to treble damages pursuant to 52 Okla. Stat. §547. Samson appealed the order entered by the trial court after remand. On October 24, 1995, the Court of Appeals filed the opinion vacating the award of treble damages. The Court of Appeals found that the trial court committed "fundamental error when it revisited the treble damages issue." (See Exhibit "A", p. 3.) The Court of Appeals held that the Supreme Court ordered the trial court to enter an order omitting the treble

damages award, not to reconsider its award based upon the Supreme Court's decision. The question presented to this Court on certiorari is did the Court of Appeals err in reversing the trial court's order on remand awarding treble damages to the Maxwells. The Maxwells respectfully request that this Court review the issue of the award for treble damages for the reasons set forth below.

STATEMENT OF FACTS

The facts giving rise to this petition for certiorari began with the drilling of the Kinnikin #1 well, in 1983 by respondent, Samson Resources Company (hereinafter "Samson"). Samson has been the operator of the well since it was drilled. In February 1984 the Kinnikin well began producing gas. Samson entered into an agreement with the purchasers to pay the proceeds to persons legally entitled to receive them pursuant to 52 Okla. Stat. §540.[4] The Maxwells

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[4]Modified and Recodified as 52 Okla. Stat. §§581.1 - 581.10.

notified Samson of their interest and requested their share of the working interest revenue. Samson refused to pay the Maxwells. The Maxwells thereafter filed suit. The trial court entered judgment for the Maxwells and awarded treble damages pursuant to 52 Okla. Stat. §547. Samson appealed. The appeal was heard by the Court of Appeals which issued an opinion essentially affirming the trial court. This Court granted certiorari and issued an opinion in Maxwell, supra, reversing and remanding the case to the trial court.

On remand the trial court found "the sole issue to be determined is whether defendants were guilty of wrongfulness that would entitle the plaintiffs to recover treble damages." (Memorandum Decision of the District Court in and for Pittsburg County, State of Oklahoma.) The trial court explained that at the original trial it made no findings of wrongful intent or motive on the part of Samson because it incorrectly believed that such a finding was unnecessary. The trial court stated on

remand that it had reviewed the evidence presented at the time of trial as to the acts of the parties and their dealings with each other. Additionally, at rehearing after remand, the trial court noted much of the testimony dealing with the wrongful actions of Samson was repeated and arguments were made based upon prior testimony. The trial court found that Samson's wrongful intent necessitated an award of treble damages. The trial court made specific findings of fact which warranted an award for treble damages:

> The Court finds under the facts in this case that Samson negotiated with the plaintiffs in bad faith, that if it was not acting with intentional misconduct it was acting with wanton disregard of the rights of the plaintiffs and deliberately avoided knowledge it would have had a duty to import to the plaintiffs. The Court finds that the failure to pay plaintiffs for their interest in the Kinnikin well was an intentional violation of plaintiffs' rights. Defendants' actions certainly fit the description of Title 23 O.S. §9 which allows exemplary damages where the conduct evinces "a wanton or reckless disregard of another."

The Maxwells believe the trial court's explanation of the basis of its award for treble damages was done pursuant to this Court's order of remand and the Court of Appeals committed fundamental error in reversing the trial court's treble damages award.

ARGUMENT AND AUTHORITY

THE COURT OF APPEALS ACTED CONTRARY TO THE DECISIONS OF THE UNITED STATES SUPREME COURT

In the case of Seal v. Corporation Com'n., supra, this Court ruled that 52 Okla. Stat. §547 did not deny due process of law in violation of the Constitutions of the United States or the State of Oklahoma. In Maxwell v. Samson, supra, this Court ruled that some degree of wrongful intent must be proven by an owner in a gas well before threefold damages may be imposed for failure to pay proceeds from the sale of gas pursuant to 52 Okla. Stat. §541-47. In remanding the case to the trial court for further proceedings consistent with the ruling

regarding recovery of treble damages, this Court acted in accord with the United States Supreme Court. However, the Court of Appeals ignored judicial precedence when it held the trial court should not have further considered the basis of its award of treble damages as directed by this Court.

The Court of Appeals' decision not only ignores the United States Supreme Court's decisions, it effectively eliminates the Maxwells' right to seek correction of judicial error that worked to their prejudice. The trial court originally refused to make a finding regarding Samson's wrongful intent despite a finding by the trial court that plaintiffs were entitled to treble damages. The trial court's failure to make a finding of fact concerning wrongful intent was judicial error that was spawned by dicta in the opinion of this Court in Seal v. Corporation Com'n., supra. Although judicial error existed, it was harmless error at the time as to the Maxwells because the trial court ruled in the Maxwells' favor; therefore, any appeal

by the Maxwells of the trial court's error for failure to find intent would have been inappropriate since no reversal of the award was being sought by the Maxwells. The plaintiffs/appellees have a right to appeal error of the trial court, but the posture of the case has so far made it impossible for petitioners to exercise their right to appeal because the rulings of the trial court have been consistent with the ultimate result the Maxwells contend is dictated by the facts and the law. Prior to the most recent decisions of the Court of Appeals, the Maxwells were satisfied with the judgment of the trial court. Clearly, it was not the intent of this Court to allow the Court of Appeals to destroy the Maxwells' right of effective appellate review to correct judicial error.

History is replete with instances in which the United States Supreme Court, as well as other appellate courts, have remanded cases to lower courts to review the award of exemplary damages after new standards for the awarding of

such damages had been announced by the courts. For example, in H.C. Hanson v. American National Bank & Trust Company, 844 S.W.2d 408 (Ky. 1992), certiorari granted and judgment vacated by 113 S.Ct. 3029 (1993), the United States Supreme Court vacated the judgment and remanded the case to the Supreme Court of the State of Kentucky for further consideration in light of the decision of the United States Supreme Court on the issue of the proper standard for an award of exemplary damages as set forth in TXO Production Corp. v. Alliance Resources Corp., 113 S.Ct. 2711 (1993). In Johnson v. Hugo's Skateway, 949 F.2d 1338 (4th Cir. 1991), on rehearing, 974 F.2d 1408, the appellate court remanded the case to the trial court for further consideration in light of the factors approved by the United States Supreme Court for determining the appropriateness of exemplary damages as set forth in Pacific Mutual Life Ins. Co. v. Haslip, 499 U.S. 1 (1991).[5]

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[5]Following are cases in which the United States Supreme Court has remanded cases for further consideration based on the new standards

In the case of Robertson Oil Co., Inc. v. Phillips

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pronounced by the Court for the award of exemplary damages.

Clayton Brokerage Co. of St. Louis, Inc. v. Jordan, 499 U.S. 914 (1991), Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Pacific Mut. Life Ins. Co. v. Haslip, ante.*, p. 1. Reported below: 861 F.2d 172 (8th Cir. 1988).

Reserve Life Insurance Co. v. Eichenseer, 499 U.S. 914 (1991), Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Pacific Mut. Life Ins. Co. v. Haslip, ante.*, p. 1. Reported below: 881 F.2d 1355 (5th Cir. 1989).

Hospital Authority of Gwinnett County, Georgia, v. Jones, 499 U.S. 914 (1991), Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Pacific Mut. Life Ins. Co. v. Haslip, ante.*, p. 1. Reported below: 259 Ga. 759, 386 S.E.2d 120 (1989).

Church of Scientology of California v. Wollersheim, 499 U.S. 914 (1991), Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Pacific Mut. Life Ins. Co. v. Haslip, ante.*, p. 1. Reported below: 212 Cal. App.3d 872, 260 Cal.Rptr. 331 (1989).

Portec, Inc. v. The Post Office, 499 U.S. 915 (1991). Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Pacific Mut. Life Ins. Co. v. Haslip, ante.*, p. 1. Reported below: 913 F.2d 802 (10th Cir. 1989).

InterContinental Life Insurance Co. v. Lindblom, 499 U.S. 956 (1991), Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Pacific Mut. Life Ins. Co. v. Haslip, ante.*, p. 1. Reported below: 571 So.2d 1092 (Ala. 1990).

Petroleum Co., 14 F.3d 373 (8th Cir. 1993) cert. denied, 114 S.Ct. 2120 (1994), an award of punitive damages was reviewed by the appellate court four times before the final determination was made and certiorari was denied by the United States Supreme Court.[6] In Robertson, the plaintiff filed an action against the defendant oil company for fraud, negligence and interference with a business relationship. After the first trial, the case was appealed. The appellate court affirmed the judgment for actual damages on interference with a business relationship but remanded for retrial on the claims for fraud, negligence and punitive damages. At the second trial, the jury awarded $4,000,000 in punitive damages based on intentional interference with a business relationship and $4,000,000 in punitive damages based on fraud. The defendant appealed on

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[6]Robertson Oil Co. v. Phillips Petroleum Co., 14 F.2d 360 (8th Cir. 1992); Robertson Oil Co. v. Phillips Petroleum Co., 871 F.2d 1368 (8th Cir. 1989); Robertson Oil Co. v. Phillips Petroleum Co., 930 F.2d 1342 (8th Cir. 1991).

several issues including the award of punitive damages. The United States District Court for the Eighth Circuit stated:

> Phillips argues that the punitive damages award was excessive and that, because Arkansas law has no definite standard for setting the amount of punitive damages, the award violates Phillips' due process rights. While this appeal was pending, the Supreme Court decided Pacific Mutual Life Insurance Co. v. Haslip, 111 S.Ct. 1032 (1991) which bears directly on Phillips' punitive damages arguments. Under Haslip we must evaluate both the jury instructions as to the punitive damages award and the adequacy of judicial review of the jury's award.
>
> * * *
>
> Haslip also stresses the importance of the trial and appellate courts' roles in scrutinizing punitive damages awards. In this case, Phillips filed a motion for remittitur, which the district court denied summarily. We are thus unable to evaluate the adequacy of the district court's review of the award. In light of the intervening decisions in *Haslip*, together with the Supreme Court's actions in remanding numerous cases for reconsideration in light of *Haslip*, we deem it advisable to remand for the district court to articulate its analysis under Arkansas law and to review the award under the criteria approved in *Haslip*, as well as principles enumerated in the Arkansas cases. [Emphasis added.]

The Eight Circuit Court of Appeals thereafter remanded the case for further consideration by the district court of the propriety of the punitive damages award.

In the instant case, the award of treble damages to the Maxwells was based on the following language in the Oklahoma Statute:

> Such power [granted to the Oklahoma Corporation Commission for rule making] shall not preclude the remedies available through the district courts as provided by existing law nor preclude the right, herewith granted, of any owner who is injured in business or property by any other owner in the well by reason of any action in violation of the provisions of this act to sue in the courts of this state and to recover threefold the damages so sustained, the costs of the suit and reasonable attorneys fees to be fixed by the court.

52 Okla. Stat. §547.

In Seal v. Corporation Com'n., supra, the Oklahoma Supreme Court upheld the constitutionality of 52 Okla. Stat. §541-47 and also ruled on challenges to the rules of the Oklahoma

Corporation Commission implementing the statute. In its opinion, the Court stated as follows regarding §547:

> The practical effect of different standards for measuring liability in district court and the Commission would force parties to seek their remedies in district court where treble damages may be recovered without fault. We find the standard for penalties to be enforced by the Commission for violations of the act and the Rules promulgated for its administration should be that imposed by Section 547 for district court actions.

The Supreme Court stated in Maxwell, supra, that the Court of Appeals had interpreted the language in Seal to mean that the trebling provision in §547 may be imposed regardless of any fault or motive. The district court, like the Court of Appeals, was under the same impression that it was not necessary to enter a finding of fault to award treble damages under 52 Okla. Stat. §547. However, in the opinion in Maxwell, the Supreme Court clarified the statement in Seal. This Court ruled that the trial court erred in not entering the finding of wrongful intent

on the part of Samson and remanded the case for further action in light of the opinion of the Court.

The Oklahoma Supreme Court had not provided the standard for an award of treble damages under 52 Okla. Stat. §547 until the opinion in the Maxwell case, and the dicta in Seal had indicated a different standard. The action of the Oklahoma Supreme Court in remanding the case for further proceedings consistent with its opinion is in accord with cases remanded by the United States Supreme Court and other appellate courts to allow lower courts to correct judicial error and arrive at a just result. The Maxwells respectfully request that this Court grant certiorari to review the opinion of the Court of Appeals that held that the trial court committed fundamental error when it conducted further proceedings consistent with this Court's opinion and found that Samson's wrongful motive and intent justified treble damages.

Respectfully submitted,

/s/ Allan DeVore

Jane Good Rowe
Allan DeVore
Marjorie Ramana
The DeVore Law Firm,
A Professional Corporation
1318 North Robinson
Oklahoma City, OK 73103
(405) 232-4997

CERTIFICATE OF MAILING

This is to certify that on the 21st day of December, 1995, a true and correct copy of the above and foregoing document was mailed, postage prepaid, to:

James M. Chaney
Matthew L. Standard
Kirk & Chaney
101 Park Avenue, Suite 800
Oklahoma City, Oklahoma 73102-7202

/s/ Allan DeVore
Allan DeVore

APPENDIX L

SUPREME COURT OF OKLAHOMA

DENNIS E. SEAL, et al.,	)	
	)	
Appellants,	)	
	)	
v.	)	No. 61636
	)	
CORPORATION COMMISSION of the State of Oklahoma,	)	
	)	
Appellee.	)	
AMERADA HESS CORPORATION)		
	)	
Appellants,	)	
v.	)	No. 61652
	)	
CORPORATION COMMISSION of the State of Oklahoma,	)	
	)	
Appellees.	)	

June 17, 1986.
As Amended Sept. 9, 1986.
Rehearing Denied Sept. 10, 1986.

Consolidated appeals were brought seeking review of rules promulgated by Corporation Commission to enforce and administer act relating to sharing ratably in revenues from sale of production of natural gas. The Supreme Court, Hodges, J., held that: (1) act was constitutional; (2) rule imposing 25%

limitation on reduction of overproduced contracted party's shares was invalid; (3) rule requiring different standard of measuring liability for violations of act in actions brought in Commission from those actions brought in district court for recovery of threefold damages was invalid. Affirmed in part; reversed in part.

Summers, J., concurred in the result.

Hargrave, J., filed dissenting opinion.

Appeal from the Corporation Commission of Oklahoma. In this consolidated appeal, appellants seek review of Rules promulgated by the Corporation Commission pursuant to Order No. 250466 to enforce and administer the provisions of 52 O.S.Supp.1983 §541, et seq. relating to sharing ratably in revenues from the sale of production of natural gas. Amerada challenges both the constitutionality of the Act and the Rules thereunder. Seal challenges only the constitutionality of specific provisions of the Rules.

AFFIRMED IN PART; REVERSED IN PART.

Tomerlin, High & High by David High, Delmer Stagner, Durbin, Larimore & Bialick by James K. Larimore, Oklahoma City, for appellants Dennis E. Seal, et al.

James H. Bailey, General Counsel, Gretchen P. Hoover, Deputy General Counsel, Patrick W. Willison, Asst. General Counsel, Oklahoma Corp. Com'n, Oklahoma City, for appellee.

McAfee & Taft by Stanley L. Cunningham, Laurence M. Huffman, Philip D. Hart and Gary W. Catron, Oklahoma City, for appellants Amerada Hess Corp. Emery McCandless & Gaitis, P.C. by Neal A. Gerstandt and James M. Gaitis, Oklahoma City, for appellant El Paso Exploration Co.

Pray, Walker, Jackman, Williamson & Marlar by Bland Williamson, Tulsa, for amicue curiae Oklahoma Independent Petroleum Ass'n.

HODGES, Justice.

This consolidated appeal presents to this Court issues regarding the constitutionality of 52 O.S.Supp.1983 ss 541-547 (Act) and the validity of Rules 6-100 through 6-113 (Rules) promulgated by the Oklahoma Corporation Commission (Commission) in Order No. 250466. Appellants Amerada Hess Corporation, et al. (collectively Amerada) challenge the constitutionality of both the Act and the Rules. The major thrust of Amerada's arguments is twofold: (1) the Act and Rules are not a valid exercise of the state's police power and is thus violative of the due process provisions of the Constitutions of the United States and Oklahoma, and (2) the Act and Rules interfere with contractual rights and obligations under the federal and state constitutions.

Appellants Dennis E. Seal, et al. (collectively Seal) challenge the validity of the Rules only, maintaining they are contrary to and inconsistent with the purpose and intent of the Act and constitute a taking of property without due process of law.

The Commission asserts the Act and Rules are constitutional and are in furtherance of a legitimate public interest and are hence a proper exercise of the State's policy.

I.
STANDING

[1] Before we discuss the merits, we must address Seal's argument concerning Amerada's standing to challenge the constitutionality of the Act. Seal contends that Amerada lacks

standing because Amerada is deprived of no constitutional right as the Act requires it to do what courts of equity would require it to do in individual actions where an imbalance has occurred. "In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues."[7] The standing doctrine encompasses several limits on the exercise of jurisdiction. At a minimum, standing is not established unless a plaintiff has "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends...."[8] The "personal stake" element is met if the plaintiff seeking redress has suffered, or is threatened with, some "distinct and palpable injury"[9] and if there is some causal connection between the alleged injury and the actions being challenged.[10] Because we conclude Amerada alleges a direct and pecuniary injury, and it seeks to protect its proceeds of sales from the purported illegal effect of the Act and Rules thereunder, we find Amerada has standing to challenge the constitutionality of the Act and Rules.

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[7]*Warth v. Seldin*, 422 U.S. 490, 498, 95 S.Ct. 2197, 2205, 45 L.Ed.2d 343 (1975).

[8]*Baker v. Carr*, 369 U.S. 186, 204, 82 S.Ct. 691, 703, 7 L.Ed.2d 663 (1962).

[9]*Warth v. Seldin*, 422 U.S. 490, 501, 95 S.Ct. 2197, 2206, 45 L.Ed.2d 343 (1975); Independent School Dist. No. 9 v. Glass, 639 P.2d 1233 (Okla.1982).

[10]*Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 41, 96 S.Ct. 1917, 1925, 48 L.Ed.2d 450 (1976).

II.
THE ACT

The public policy considerations prompting the challenged legislation were first discussed in a concurrent resolution, S.C.Resolution No. 7 entitled "Oil and Gas--Sales--Discrimination," passed by the Senate on February 22, 1983, and by the House of Representatives on March 1, 1983, and filed with the Secretary of State on March 2, 1983. The findings set forth in the resolution are as follows:

> "WHEREAS, the State of Oklahoma has the right under its police powers and conservation authority to protect the citizenry of this state from losses by reason of discrimination; and
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> "WHEREAS, many mineral owners and participants in oil and gas well drilling projects are being discriminated against in the sale of the production of their wells in that purchases are being made from one co-owner as against another; and
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> "WHEREAS, such inability of each co-owner to sell the production from a well may result in the Corporation Commission shutting-in such well to protect individual rights and correlative rights; and
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> "WHEREAS, when many wells are placed into production, the pro rata share in the net revenue of many owners, including those with working interests, overriding royalties and mineral interests is not being respected and paid; and

> "WHEREAS, the net effect of such predatory practices in the sale of well production will cause financial distress to the smaller co-owners; and
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> "WHEREAS, the inherent wealth of the great lands of Oklahoma is being divested from its rightful recipients; and
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> "WHEREAS, the continuance of discriminatory purchases and the dishonor of rightful pro rata shares in the production proceeds of many wells in Oklahoma will have serious effect upon the economic health of the State of Oklahoma."[11]

On May 3, 1983, Governor George Nigh signed into law Enrolled House Bill No. 1221, codified as 52 O.S.Supp.1983 §§ 541-547. The Act which became effective immediately is expressly intended to address the protection of "the rights and correlative rights of all interest owners of natural gas wells and wells producing casinghead gas and to afford all such owners an equal opportunity to extract their fair share of gas and to sell and be paid in proportion to their interest therein." The Act is further expressly intended "to protect such owners against discrimination in purchases in favor of one owner as against another."[12]

Under Section 542, whenever a well is placed into production, all owners are entitled to share ratably in the revenues from the sale of production. Prior to the date of first

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[11]1983 Okla.Sess.Laws 1172-1173.

[12]52 O.S.Supp.1983 § 541.

production, the operator of the unit area must offer each owner of the well an election whereby the operator seeks to market that owner's ratable share of production or a designated portion thereof. In the event the owner so elects, the operator shall seek to market the owner's share at the best price and terms available in the area but not at a price or terms less favorable than those received by the operator. Each electing owner has 30 days within which to reject the offer but the owner's failure to reject is deemed an acceptance thereof. If no offer to purchase is secured within 120 days of an election the owner may rescind the election in writing. If an owner does not exercise the election, the owner is not obligated to deliver his ratable share for sale nor is the operator obligated to market such share. The Act does not prevent each owner from receiving the price agreed upon by contract and from taking his share of production in kind or separately disposing of his share. Section 543 provides that if an electing owner receives a contract for sale of only his portion of production, the other electing owners having no contract are entitled to share ratably in the revenue from the contract "to the extent of their net revenue interest." Each electing owner receiving a contract to sell must give written notice to all other net revenue owners without a contract for the purchase of their share.

Section 544 provides that the amount of gas produced daily from a well is owned by each owner in the well in proportion to each owner's interest in the well, irrespective of which owner actually produces the gas. Each owner producing and selling or disposing of gas separately must account to the other owners not selling or otherwise disposing of gas and compensate them for their proportionate part of the gas disposed of or sold.

Section 545 provides that distribution of revenue from the sale of production be made pursuant to 52 O.S.Supp.1985 § 540. Additionally, any owner receiving revenues directly from the purchaser must forward the same to the party responsible for distribution under Section 540.

Section 546 states that the Act shall not be construed as setting or restricting the price, terms or conditions under which a purchaser takes the production of a well; requiring any purchaser to connect any well that it is not already obligated to connect; and altering or changing the legal definitions of common purchaser and common carrier. Section 547 empowers the Commission to promulgate rules and regulations for implementing the Act, including the power to establish and enforce penalties for violations thereof. It provides that such power does not preclude the remedies available through the district courts nor preclude any owner from recovery of treble damages and attorneys fees.

Oklahoma law has historically required ratable taking from a common source of supply.[13] In *Inexco Oil Co. v.*

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[13]52 O.S.1981 §§ 23-25 (enacted 1913) (creates status of common purchaser and common carrier and imposes requirement of ratable taking); 52 O.S.1981 §§ 233-235 (enacted 1913) (requires any person taking gas from a gas field to take ratably from each owner of the gas in proportion to his interest in said gas); 52 O.S.1981 §§ 236, 237 and 239 (enacted 1915) (directs Commission to preserve rules and regulations for taking of gas from common sources of supply so as to prevent waste, protect interest of public, and of all those having a right to produce therefrom, and to prevent unreasonable discrimination in favor of any one such common source of supply as against another); 52 O.S.1981 §§ 240 and

Corporation Commission, 628 P.2d 362, 364 (Okla.1981), this Court observed in connection with a discussion concerning ratable taking in a common source of supply under 52 O.S.1981 §§ 23 and 24.1:

> "The basis for the enactment of Oklahoma's oil and gas conservation laws is to protect correlative rights. The purpose of the regulatory scheme concerning common carriers and common purchasers of gas is to afford the producers of a common source of supply and equal opportunity to market and transport oil and gas from their wells." (Footnotes omitted).

The Act differs with all previous legislation in that it is directed towards producers rather than purchasers and towards co-owners within a single well as opposed to owners of interests between wells in a common source of supply. Moreover, the Act entitles each owner to share ratably in the revenues generated by the sale of production and creates a type of cotenancy property interest in such proceeds.

Prior to the passage of the Act, serious problems beset the gas industry in the State of Oklahoma. In the early 1980s discriminatory practices resulted from a surplus in deliverability of natural gas. Pipelines had burdensome contractual obligations to take gas which greatly exceeded their ability to market. This circumstance caused pipelines to either ignore their contractual obligations to take under existing contracts or exercise their options to "market out."

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242 (enacted 1915) (authorizes Commission to make regulations for delivery, metering and equitable purchasing and taking of gas).

Additionally, with regard to the acquisition of new gas reserves, they would enter into contracts with some producers and refuse to contract with other working interest owners within the same well. Non-contracting owners were generally unable to obtain a gas purchasing contract for their gas due to the surplus. Thus purchasers could take as much gas as desired from a well with only a contractual obligation to favored producers. The industry employed the use of gas balancing contracts either contained in joint operating agreements, or otherwise, which attempted to protect rights of non-selling working interest owners by providing that their pro rata share of the gas would be balanced when the reserves were depleted. This gas balancing arrangement customarily would not afford any interest on delayed income. The non-selling owners were denied the use of these funds and moreover, there was no guaranty that the selling owners who received more than their pro rata share of proceeds would be capable, regardless of the obligation, to satisfy their liabilities after balancing of rights. All interest owners in a well would have paid their proportionate share of the drilling and completion costs of production; however, because purchasers would not take ratably from all owners, non-selling owners would not immediately receive their share in the proceeds from the well. Consequently, non-selling working interest owners would be unable to pay excess or overriding royalties to their lessees until such time as the provisions of their relevant gas balancing agreements come into effect. Under gas balancing agreements, payment of the proceeds to the non-selling owners would be deferred in many instances until the depletion of the well if the owners were unable to find a purchaser as opposed to payment as and when the production was taken from the well.

The Act addresses these kinds of abuses in the industry by providing for immediate balancing of all proceeds of

production from a single gas well from the date of first production on and after the effective date of the Act. It gives the right of ownership of interests in a gas well ratably to each co-owner in the proceeds generated by a well's production as of the moment the gas is reduced to possession consistent with the well recognized principle of the law of capture which is founded on the concept of animals *ferae naturae, i.e.*, property rights in animals are not acquired until the owner reduces them to possession by capturing them.

III.
POLICE POWER

The threshold question before the Court, which is the common thread in Amerada's challenge to the legislation on both grounds of constitutional due process and restrictions on laws which impair the obligation of contracts is: Whether the Act constitutes a proper exercise of the police power of the State. As previously noted the expressed legislative intent is to protect the rights and correlative rights of all interest owners of wells, afford all owners an equal opportunity to extract and sell their share of gas and protect all owners against gas purchase discrimination. The focus of Amerada's argument is that the State is limited to affecting rights only as they relate to co-owners in a common source of supply relative to separate wells as distinguished from co-owners in a single well. And, the Act by requiring one producer to share his market with other owners in a well does not operate to serve the expressed legislative intent.

It is well settled that the State may adopt reasonable regulation in the exercise of its police power to protect the

correlative rights of owners through ratable taking.[14] "Such

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[14]*Cities Service Gas Co. v. Peerless Oil & Gas Co.*, 203 Okl. 35, 220 P.2d 279, 285, aff'd, 340 U.S. 179, 185, 71 S.Ct. 215, 219, 95 L.Ed. 190 (1950); *Patterson v. Stanolind Oil & Gas Co.*, 182 Okl. 155, 77 P.2d 83 (1938).

It is provided in Summers, Oil and Gas § 75.3 (Perm.Ed.1962):

> "If permeability is high in the common source of supply of gas, a few operators may effectively drain much of the field. When sufficient reserves have been established to attract a pipeline into the field, the pipeline purchaser is in a position to take most of the gas from a few favored producers. Further, the law of capture makes it possible for a vertically integrated pipeline company to produce gas from its own selected properties and to drain much of the gas from the field without purchasing any gas from other owners. Either situation is conducive to waste above ground in that owners who are not favored are likely to seek or accept opportunities to market the gas for purposes which constitute a waste of valuable energy. The situation is also conducive to waste below the surface in that development wells will not be properly drilled to achieve the maximum in ultimate recovery. Ratable take and common purchaser orders have the common effect of preventing discrimination in carrying and purchasing gas, but the ultimate purpose is to prevent waste and to protect correlative rights."

legislation does not infringe the constitutional inhibitions against taking of property without due process of law, denial of the equal protection of the laws, or taking property without just compensation."[15] Amerada asserts the Act does not involve correlative rights urging a definition of such as those rights existing between owners of interests in a common source of supply while excluding owners of the same interests within a well, citing *United Petroleum Exploration, Inc. v. Premier Resources, Ltd.*, 511 F.Supp. 127 (W.D.Okla.1980). In *Tenneco Oil Co. v. El Paso Natural Gas Co.*, 687 P.2d 1049, 1053 n. 11 (Okla.1984), a case dealing with the Commission's subject-matter jurisdiction, we accepted the refinement to our definition[16] of correlative rights by the United States District Court in *United*:

> "[C]orrelative rights are those rights which one owner possesses in a common source of supply in relation to those rights possessed by other owners in the same common source of supply [which is] the underlying geological strata from which the oil and gas is produced, rather than

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[15] *Anderson-Prichard Oil Corp. v. Corporation Commission*, 205 Okl. 672, 241 P.2d 363, 372 (1951).

[16] *Kingwood Oil Co. v. Corporation Commission*, 396 P.2d 1008, 1010 (Okla.1964): "The term 'correlative rights' has been defined as a convenient method of 'indicating that each owner of land in a common source of supply of oil and gas has legal privileges as against other owners of land by lawful operations conducted on his own land, limited, however, by duties to other owners not to injure the source of supply and by duties not to take an undue proportion of the oil and gas.' Summers, Oil and Gas, Vol. 1, Sec. 63."

> the well through which the oil and gas is reduced to possession."[17]

In the text of the opinion it was stated in connection with a discussion of proper subjects for private contract: "This is not to say that the rights to produce the designated quantity of hydrocarbons from *the well* and the division thereof, *the public interest*, and the owner-operator interests are not the proper subject of a private contract." 687 P.2d at 1053 (Emphasis added).

In *Samson, supra*, this definition was reiterated again in connection with the determination of the Commission's valid exercise of subject-matter jurisdiction to protect correlative rights "in situations in which a conflict exists which actually affects such rights within a common source of supply and thus affects the public interest in the protection of production from that source as a whole." There, this Court found an interest owner's request to be designated as unit operator, displacing the unit well operator under a voluntary agreement, did not concern a dispute in which the public interest in correlative rights was involved. We stated the basis for the interest owner's argument did not "truly concern the disproportionate taking of gas from a common source of supply, as it has attempted to so characterize its argument." We do not believe the newly refined definition of correlative rights adopted in our recent pronouncements regarding the Commission's subject-matter jurisdiction, inhibits the State's police power to protect correlative rights in the challenged Act.

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[17]*See also Samson Resources Co. v. Corporation Com'n*, 702 P.2d 19, 22 (Okla.1985).

In *United*, the federal court in addressing an interest owner's assertion that another owner/operator's over-production of gas in a well had damaged its correlative right to production, stated the alleged imbalance was "in large measure, a fiction." It noted the dispute was not whether the operator's actions in reducing to possession a quantity of gas had resulted in a hampering of the owner's ability to conduct its own operation to obtain possession of a quantity of gas from the same supply source; but rather, it revolved around whether the owner of the producing gas well could disclaim title to that portion of the production occurring while it was physically unable to take possession of its fair share, and assert instead an absolute ownership over a mathematically balanced volume of production *after* possession capability was provided. The court determined the equitable considerations required immediate cash balancing rather than a balancing in kind. Although *United* dealt with balancing the production of gas between co-owners in a single well, an infringement upon the correlative rights did not exist. The particular circumstances presented there were the co-owner had refused an immediate cash balancing tendered by the operator in anticipation of the existence of a split stream connection in the near future. The co-owner refused the only viable method of balancing then available. Doubtless the co-owner's correlative rights were not injured. *United* is inapposite to the current controversy. Consequently, the discussion of correlative rights in that case has no bearing on the present perceived abuse in the industry as addressed in the challenged Act.

[2-4] We do not read *United* to hold, as Amerada contends, that correlative rights never exist among owners of a single well. In our opinion unless all owners in a well have equal opportunity to sell gas from the well, they are not afforded the opportunity to produce their just and equitable

share of the gas. The purpose of the Act is to afford this opportunity. Viewed in this light, there is no doubt that the Act protects correlative rights.

[5] It should be noted at this point that the rule of judicial construction requires us to look to the legislative intent as manifested from all parts of the Act, being mindful that whenever reasonably possible, a statute must be so construed as to uphold its validity.[18] The Legislature may regulate a business affected with a public interest for the protection of the general welfare, and every possible presumption is to be indulged in favor of the correctness of its finding.[19] We find the purpose of the Act is a proper function of the Legislature under its police power.

IV.
DUE PROCESS

[6] Amerada contends the Act denies due process of law in violation of the federal and state Constitutions.[20] Under this proposition it argues (1) the Act constitutes a taking of property for private use, (2) the Act changes accrued rights under spacing and pooling orders of the Commission and (3) the Act is unconstitutionally vague.

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[18]*Skinner v. State*, 189 Okl. 235, 115 P.2d 123, 126 (1941).

[19]*Semke v. State ex rel. Okl. Motor Vehicle Com'n*, 465 P.2d 441, 445 (Okla.1970).

[20]U.S. Const. amend. 14; Okla. Const. art. 2 §§2, 7 and 23 and art. 5 §54.

In connection with its first argument, Amerada asserts the Act creates an unintended third party beneficiary contract. Amerada cites 15 O.S.1981 §29[21] in support of this argument. We are not persuaded by this assertion. Although a purchaser may be held liable for conversion if the purchaser has notice that the non-contracting party has rescinded the operator's authority to dispose of his gas, 1 Kuntz, *Oil and Gas* § 11.2, at 242-43 (1962), the Act does not entitle a non-contracting owner to sue on another owner's contract with a purchaser. The Commission correctly maintains the benefit to the non-contracting party arises incidentally to the performance of the contract due to the rights created by the Act.

[7] The core of Amerada's due process argument is that the Act does not serve any public purpose. Our foregoing view of this issue disposes of this argument. In *Cities Service Gas Co. v. Peerless Oil & Gas Co.*, 340 U.S. 179, 185, 71 S.Ct. 215, 219, 95 L.Ed. 190 (1950), the United States Supreme Court stated the challenger's argument regarding similar ratable take provisions as to due process was "virtually without substance." The Court upheld the contested order reasoning that it is "undeniable that a state may adopt reasonable regulations to prevent economic and physical waste of natural gas." The standard applied was that such regulations be

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[21]It is provided in 15 O.S.1981 § 29:

> "A contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it."

"substantially related to a legitimate end sought to be attained."[22]

In applying this standard to the present case, we find the means employed by the Act are substantially related to the legitimate end of protecting correlative rights. The measure of reasonableness of the Act enacted under the State's police power is what is fairly appropriate to its purpose and not necessarily what is best.[23]

[8][9] With regard to Amerada's second argument that the Act could alter the right of individuals under existing spacing and pooling orders to receive certain proceeds on a tract allocation basis as provided by 52 O.S.1981 §87.1(e) (amended 1985) as interpreted by this Court in *Shell Oil Co. v. Corporation Commission*, 389 P.2d 951 (Okla.1964) (commonly referred to as the *Blanchard* decision), we conclude the Act does not violate Article 5, §54 of the Oklahoma Constitution.[24] The constitutional reference to an "accrued

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[22]340 U.S. at 186, 71 S.Ct. at 219 (citing *Nebbia v. New York*, 291 U.S. 502, 54 S.Ct. 505, 78 L.Ed. 940 (1934)).

[23]*Id.; Hud Oil and Refining Co. v. City of Oklahoma City*, 167 Okl. 457, 30 P.2d 169 (1934).

[24]Okla. Const. art. 5, § 54 provides:
"The repeal of a statute shall not revive a statute previously repealed by such statute, nor shall such repeal affect any accrued right, or penalty, incurred, or proceedings begun by virtue of such repealed statute." (Emphasis added).

right" means a matured cause of action[25] not simply a right or privilege in general which accrues under proceedings which have begun. Amerada does not argue the existence of any accrued cause of action which has been disturbed by the Act.

[10] Lastly, Amerada maintains under its due process challenge the provisions of the Act are unconstitutionally vague. In support of this contention, it construes various sentences of Section 544 as conflicting mandates requiring both unit allocation and contract allocation. It points to the second sentence thereof asserting it requires an allocation of all proceeds on a unit basis.[26] It further notes the language in the third and fourth sentences and asserts they appear to provide for sharing of gas proceeds on a contract basis.[27]

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[25]*Cowart v. Piper Aircraft Corp.*, 665 P.2d 315 (Okla.1983); *Barry v. Board of Commissioners of Tulsa County*, 173 Okl. 645, 49 P.2d 548 (1935).

[26]The second sentence of 52 O.S.Supp.1983 § 544 reads:

> "The amount of gas produced daily, irrespective of the owner producing, belongs to, is owned by and shall inure to the benefit of each owner in the well in proportion to each owner's interest in the well.

[27]The third and fourth sentences of 52 O.S.Supp.1983 § 544 read:

> "Each owner who produces natural gas or casinghead gas and who separately sells or otherwise disposes of the gas must account to

A general rule of statutory construction is that "[l]egislative acts are to be construed in such manner as to reconcile the different provisions and render them consistent and harmonious, and give intelligent effect to each."[28]

In addition, this Court has stated:

> "A general rule is that all legislative enactments must be interpreted in accordance with their plain ordinary meaning according to the import of the language used."
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> and
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> "In determining legislative intention words, phrases, and expressions will be accorded their ordinary meaning when practical to do so, ..."[29]

> each other owner in the well not selling or otherwise disposing of gas from the well for that owner's part of the gas so disposed of or sold. In addition, each selling or disposing owner must compensate each owner not selling or disposing of gas from the well for that owner's proportionate part of the gas disposed of or sold."

[28]*Eason Oil Corp. v. Corporation Commission*, 535 P.2d 283, 286 (Okla.1975) (citing *Personal Loan & Finance Co. v. Oklahoma Tax Com'n*, 437 P.2d 1015 (Okla.1968)).

[29]*Id.* (quoting *Alfalfa Electric Coop., Inc. v. First National Bank & Trust Co.*, 525 P.2d 644 (Okla.1974)).

Furthermore, "a statute should be given a sensible construction, bearing in mind the evils intended to be avoided or the remedy afforded."[30]

Applying these recognized principles relating to construction of legislative enactments to the present Act, we find the sensible construction to be given to the noted provisions is that urged by Seal and the Commission. The second sentence provides a general rule of ownership as to gas which is reduced to possession from a well to be given effect by the method set forth in the following sentences. The third and fourth sentences provide the method by which owners selling under contract are required to compensate other owners not selling under contract for their proportionate share of gas sold. Consequently, we find no merit in Amerada's argument as to vagueness.

V.
IMPAIRMENT OF CONTRACTUAL OBLIGATIONS

[11] We next address Amerada's contention that the Act impairs the obligations of contracts in violation of the Contract Clause of the federal and state constitutions.[31] In making this argument, Amerada maintains first that the Act creates a class

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[30]*AMF Tubescope Company v. Hatchel*, 547 P.2d 374, 379 (Okla.1976).

[31]The federal Contract Clause provides that "[n]o State shall ... pass any ... Law impairing the Obligation of Contracts...." U.S. Const., art. I, § 10, cl. 1. Similarly, the comparable state constitutional provision contained in Okla. Const., art. 2, § 15 provides that "nor any law impairing the obligation of contracts, shall ever be passed."

of third party beneficiaries who benefit from existing gas purchase contracts contrary to the intention of the parties to the contract as required by 15 O.S. 1981 § 29. It points out that under the Act a non-contracting party benefits under the contract but has no apparent burdens. Consequently, in times of upward market price adjustment he would be free to sell his gas to another purchaser for a higher price than that provided in the contract from which he is benefitting, as his acreage would not be dedicated to the purchaser under the contract. As set forth in Part IV of this opinion, 15 O.S. 1981 § 29 does not support this argument. Nor does 52 O.S.Supp.1983 § 542 support this position. The non-contracting party may reject an offer presented by the operator to purchase the gas; or if the operator has failed to present an offer within 120 days, after the non-contracting party has elected to allow the operator to market the gas, the election may be rescinded in writing. A non-contracting party, who has accepted an offer to purchase gas is bound by the agreement. Furthermore, we do not believe the Act creates a third party beneficiary contract. On the contrary, it affords no right to a third party to sue on another's contract. The benefits to the non-contracting party arise incidentally to the performance of the contract due to the rights created by the Act. Accordingly, Amerada's challenge under 15 O.S. 1981 § 29 has no merit.

[12] Secondly, Amerada asserts the Act impairs the obligations under the royalty clause contained in many existing oil and gas leases which generally provide for allocation of production from a well on a unit basis for owners of royalty interests and an allocation on a tract basis for owners of working interests. Under this scheme of allocation pursuant to this Court's interpretation of 52 O.S. 1961 § 87.1 in *Shell Oil Co. v. Corporation Commission*, 389 P.2d 951 (Okla.1963), all burdens on the various working interests, other than the

statutorily recognized one-eighth royalty paid proportionately by each working interest owner to each holder of a royalty interest in a well, were satisfied from the portion of production allocated to the working interest to which they were attached. In *Shell Oil Co., supra*, this Court interpreted the statutory scheme of allocation as superseding the terms of lease agreements as understood by the industry. Although the industry may have arranged its affairs in accordance with the *Shell Oil Co.* case, the current scheme is likewise subject to subsequent actions of the Legislature which may also have a disturbing effect. We simply cannot agree that parties have an accrued right to an allocation of proceeds of gas pursuant to Section 87.1 as interpreted in *Shell Oil Co.* The statutory allocation scheme which altered existing contract terms, like all legislation setting forth the terms on which private parties may execute contracts, is subject to revision or repeal. Moreover, the existence of an atmosphere of pervasive regulation of the natural gas industry[32] strongly suggests the parties had no legitimate expectation that the statutory scheme was a stable, unchanging one. Interest owners thus must hold their interests with the knowledge that the State retains substantial regulatory power over those interests.[33]

[13] Thirdly, Amerada asserts the Act unconstitutionally impairs contract rights because it modifies the terms of the "standard" operating agreement by converting the operator's *right* to sell gas on behalf of owners who do not have a contract into an *obligation*. In addition, it argues the Act eliminates the right of an interest owner to take gas in kind

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[32]*See e.g., Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 413, 103 S.Ct. 697, 705, 74 L.Ed.2d 569 (1983).

[33]*Id.*

and separately dispose of his own share of production which owners generally had under the operating agreement. It notes Section 544 of the Act requires an owner taking in kind to share his market immediately with other owners in the unit and then argues this arbitrary "across the board" application, irrespective of particular circumstances, does not allow equitable balancing pursuant to long standing custom and practice in the industry.

In connection with custom within the industry, we have stated: "Custom or usage repugnant to expressed provisions of statute is void."[34] Accordingly, no amount of custom can be the basis for our decision herein. We therefore cannot conclude that the Legislature impaired a private contractual right simply by enacting legislation that was contrary to industry custom and practice. Moreover, Section 542(D) expressly provides: "Nothing in this act shall be construed to prevent any owner or owners ... from taking their share of production in kind or separately disposing of their share."

[14] The United States Supreme Court has addressed Contract Clause challenges to oil and gas state legislation in two recent opinions. In *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 103 S.Ct. 697, 74 L.Ed.2d 569 (1983), the Court upheld the constitutionality of a Kansas act which imposed price controls on the intrastate gas market with regard to contracts executed before April 20, 1977, and prohibited consideration either of ceiling prices set by federal authorities or of prices paid in Kansas under other contracts in the application of governmental price escalator and price redetermination clauses. In 1975, a natural gas producer had

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[34]*Tenneco*, 687 P.2d at 1054 (quoting *Okla. N.M. & P. Ry. Company v. Downey*, 116 Okl. 253, 244 P. 173 (1926)).

entered into intrastate gas sales contracts with a public utility which contained a governmental price escalator clause and a price redetermination clause. The Court rejected the public utility's argument that the Kansas act violated the Contract Clause because it diminished the effect of the indefinite escalator clause in the contracts by limiting the increases allowed under the Natural Gas Policy Act (NGPA). No sufficient impairment of the public utility's contract was found to give rise to a Contract Clause challenge. The two factors which influenced the Court's decision were, first, the finding that it was highly unlikely at the time of execution of the contracts that the public utility anticipated the deregulation of gas prices introduced by the NGPA and; thus, the public utility did not have a reasonable expectation to receive deregulated prices which would have been impaired by the Kansas act. And, second, the parties were operating in a heavily regulated industry; therefore, the public utility knew its contractual rights were subject to alteration by state price regulation.

In *Exxon Corp. v. Eagerton*, 462 U.S. 176, 103 S.Ct. 2296, 76 L.Ed.2d 497 (1983), the Alabama statute under review increased the severance tax on oil and gas extracted from Alabama wells, exempted royalty owners from the increase and prohibited producers from passing on the increase to their purchasers. The Court held the royalty owner exemption and the pass-through prohibition did not impair the obligations of contracts in violation of the Contract Clause. Although the Court found the pass-through prohibition affected contractual obligations of which producers were beneficiaries, it concluded the prohibition did not offend the Contract Clause. The Court noted as the distinguishing factor in this case:

> "[T]he pass-through prohibition did not prescribe a rule limited in effect to contractual

> obligations or remedies, but instead imposed a generally applicable rule of conduct designed to advance 'a broad societal interest' protecting consumers from excessive prices." *Exxon Corp.*, 462 U.S. at 191, 103 S.Ct. at 2306 (Citation omitted).

In footnote the Court stated its conclusion was buttressed by the fact that appellants operate in industries that have been subject to heavy regulation. The essence of the appropriate Contract Clause standard articulated by the Court in these two cases is as follows: The threshold determination is whether the legislation has substantially impaired contractual rights. If no substantial impairment exists, the analysis is at an end and the legislation is upheld. If substantial impairment is found, it is justified only if the State's legislation is addressed to "a significant and legitimate public purpose ... such as the remedying of a broad and general social or economic problem"[35] and the means selected to achieve that end is based " 'upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation's] adoption.' "[36] The determination of the necessity and reasonableness of the means chosen is deferred to legislative judgment unless the state itself is a contracting party.

Applying this standard to the present case, our initial determination is whether the Act has, in fact, operated as a

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[35]459 U.S. at 411-412, 103 S.Ct. at 704-705.

[36]459 U.S. at 412, 103 S.Ct. at 705 (quoting *United States Trust Co. v. New Jersey*, 431 U.S. 1, 22, 97 S.Ct. 1505, 1517, 52 L.Ed.2d 92 (1977)).

substantial impairment of a contractual relationship. In determining the severity of the impairment consideration is given to the parties' reliance upon the contractual rights and obligations allegedly impaired.[37]

Amerada asserts the Act substantially impairs existing contractual relationships in that it negates the right accorded by a joint operating agreement to every party to the agreement to take in kind or separately dispose of his share of production and retain the benefits, i.e., production revenues, of such right. It further contends that such parties possessed a legitimate contractual expectation that such right was secure and not subject to being abrogated by subsequent legislation. We disagree.

The State of Oklahoma like the State of Kansas in *Energy Reserves Group, Inc.*, has extensively and continuously regulated the natural gas industry. Although Oklahoma has not required a ratable sharing of proceeds specifically, it has regulated production and purchasing in the industry. Much of Amerada's assertions necessarily fall with our foregoing conclusion that the parties could not have reasonably expected that their contractual rights were immune from alteration by subsequent State regulation. We thus find Amerada's reasonable expectations have not been substantially impaired by the Act.

[15] Even if an impairment were found, the Act was enacted to protect a broad societal interest, i.e., the protection of correlative rights. We are not persuaded by Amerada's

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[37] *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 245, 98 S.Ct. 2716, 2723, 57 L.Ed.2d 727 (1978); *cf. Energy Reserves Group, Inc.*, 459 U.S. at 413-16, 103 S.Ct. at 705-07.

contention that the Act is nothing more than "special interest legislation." To the contrary, the Act imposes a general rule of conduct for the natural gas industry.

VI.
THE RULES

On December 21, 1983, the Commission promulgated the Rules to administer the provisions of the Act pursuant to Section 547 to be effective January 1, 1984. Amerada's primary position is the Rules are void *in toto* because the Act is unconstitutional. As we have previously found the Act constitutional this position has no merit. Seal challenges the validity of various provisions of the Rules and argues that such provisions are contrary to the express intent of the Act. Seal urges this Court to strike down the alleged conflicting Rules. The Commission, on the other hand, asserts the Rules do administer the purpose of the Act and urges sustention of the Rules *in toto*. The specific provisions attacked will now be addressed in turn.

Sea! first attacks the validity of Rule 6-100[38] to the

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[38]Rule 6-100 provides:

"A. *All interest owners in a well producing natural gas or casinghead gas shall be afforded an equal opportunity to extract their fair share of gas and to sell said gas and to be paid in proportion to their interest therein. In the event any interest owner in such a well is a party to a joint operating agreement, gas balancing agreement and/or any other written agreement, then to the extent that the provisions of such agreement or agreements expressly provide for the taking, sharing or gas balancing of gas produced from such well in a manner other than as set forth in these Rules, then such provisions shall bind that interest owner who is a party to such agreement or agreements as between the parties to the exclusion of the marketing, revenue sharing and gas balancing provisions provided hereunder.*

"B. As used in Rule 6-100 through Rule 6-113:

1. 'Interest owner' is a working interest owner or any person in a well having the right to produce or separately dispose of his gas;

2. 'Contracted party' is any interest owner in an oil or gas well who is a party to a contract for the sale of gas produced from that oil or gas well;

extent that it exempts parties to existing gas balancing agreements from the application of the Act. It argues these exclusionary provisions of Rule 6-100 are in direct conflict with Section 541 which provides for the express purpose and intent of the Act to afford all interest owners an equal opportunity to extract, sell and be paid for their proportionate share of the gas produced. It further asserts such provisions are contrary to Section 544 which provides that each day's production shall belong to each interest owner in proportion to each owner's interest. Additionally, it maintains if this Court limits the Act consistent with Rule 6-100, this will result in cutting off the receipt of royalty in excess of the basic ⅛th of royalty owners whose corresponding working interest owners have entered into gas balancing agreements in a manner other than as set forth in the Rules but have no gas purchase contract.

[16-19] We believe that Section 542(D), which states that the Act shall not be construed to interfere with contractual rights or to prevent any owner from taking its share of production in kind or separately disposing of its share, also includes an owner's right to enter into gas balancing agreements which provide for the disposition between interest owners. We find nothing in the Act which expresses an intent to prevent such agreements. Moreover, contrary to Seal's contentions, such royalty owners' recovery is merely delayed

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3. 'Non-contracted party' is any interest owner in an oil or gas well who does not have a gas contract for his share of gas production *and who has not entered into any other agreement as provided above that governs the taking or sharing of gas* and, therefore, is not subject to the provisions of these Rules." (Emphasis supplied).

until such time as the provisions of the pertinent gas balancing agreements come into effect, not precluded entirely. The exclusionary provisions were apparently designed to minimize the impairment of obligations under private contractual arrangements between interest owners to any extent greater than that which is absolutely necessary to protect the rights and correlative rights of the parties. We reject, however, the Commission's construction of the Act raised on appeal in response to Seal's challenge to the Rule, under which royalty owners and overriding royalty owners would be accorded an independent right to produce gas and enter into contracts for its sale.[39] Upon an examination of the Act we find this construction was clearly not intended by the Legislature or the Commission. It is fundamental that an oil and gas lease grants to lessees the right to drill and produce. And, a concomitant principle is that royalty and overriding royalty owners (the mineral owners/lessors) are without the right to drill and produce for they have given up such right in exchange for a specified bonus consideration and royalty on production.[40] By bringing into balance the rights of all owners of the right to drill and produce the Act will also benefit royalty and overriding royalty owners whose rights derive from those of the owners of the right to drill and produce. We, therefore, conclude that Rule 6-100 does not vitiate the overall purpose of the Act.

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[39]The Commission relies upon the term "owner" or "owners" as used in 52 O.S.Supp.1983 § 542(A), (D) which we construe to mean parties who have a right to take their share of production in kind or to separately dispose of their share.

[40]*O'Neill v. American Quasar Petroleum Co.*, 617 P.2d 181, 184 (Okla.1980); *Hinds v. Phillips Petrol Co.*, 591 P.2d 697 (Okla.1979).

[20] Seal contends Rule 6-102 erroneously limits the application of the gas balancing provisions of the Act to proceeds of production received on or after May 3, 1983, the effective date of the Act. It argues the revenue sharing provisions of the Act have full retroactive effect as to revenue received prior to May 3, 1983. In support of this argument it references legislative history including the comments of one of the co-authors of the Act regarding its intent and purpose and also S.C. Resolution No. 7 of the Legislature.

We first note, "[a] cardinal principle of statutory construction is that where the language of a statute is plain and unambiguous and the meaning clear and unmistakable, there is no room for construction, and no justification exists for interpretive devices to fabricate a different meaning."[41] Also, "[i]t is the rule of statutory construction that all statutes are to be construed as having a prospective operation unless the purposes and intention of the Legislature to give them a retrospective effect is expressly declared, or is necessarily implied from the language used."[42]

We conclude that the Legislature's use of particular language in the Act evidences an intent that it is to be applied prospectively only. Furthermore, the Legislature does not expressly declare, nor by implication, that the Act should have retroactive effect. For instance, Sections 543 and 544 provide

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[41] *In re Guardianship of Campbell*, 450 P.2d 203 (Okla.1966).

[42] *Hammons v. Muskogee Medical Center Authority*, 697 P.2d 539 (Okla.1985); *Wickham v. Gulf Oil Corp.*, 623 P.2d 613 (Okla.1981); *Good v. Keel*, 29 Okl. 325, 116 P. 777 (1911).

for "on and after the effective date of this act" and speak in terms of the present tense. We find the Act is to be applied prospectively only and thus sustain the validity of Rule 6-102.

[21] Seal next challenges specific provisions of Rules 6-101, 6-102, 6-103, 6-107 and 6-112 on the basis that such Rules are in conflict with the provisions of 52 O.S.Supp.1985 §540 as incorporated in the Act by Section 545.[43] Rule 6-101

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[43]52 O.S.Supp.1985 §540 provides in relevant part:

> "A. The proceeds derived from the sale of oil or gas production from any oil or gas well shall be paid to persons legally entitled thereto, commencing no later than six (6) months after the date of first sale, and thereafter no later than sixty (60) days after the end of the calendar month within which subsequent production is sold. Such payment is to be made to persons entitled thereto by the first purchasers of such production.... The first purchaser shall be exempt from the provision of this subsection and the owner of the right to drill and to produce under an oil and gas lease or force pooling order shall be substituted for the first purchaser therein where the owner and purchaser have entered into arrangements where the proceeds are paid by the purchaser to the owner who assumes the responsibility of paying the proceeds to persons legally entitled thereto."
>
> "B. Any said first purchasers or owner of the right to drill and produce substituted for the first

provides for sharing of proceeds of sales of natural gas as between contracted and non-contracted parties in gas sales contracts entered into on or after January 1, 1984, the effective date of the Rules. Similarly, as discussed above, Rule 6-102 provides for revenue sharing between contracted and non-contracted parties for sales of gas on or after May 3, 1983, up to the effective date of the Rules under contracts entered into prior to May 3, 1983, the effective date of the Act. Rule 6-103 provides for revenue sharing between such parties for gas sales on or after the effective date of the Act and prior to the effective date of the Rules under contracts entered into during the same period. The provisions of all three Rules are similar except they are each addressed to different situations

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> purchaser as provided herein that violates this act shall be liable to the persons legally entitled to the proceeds from production for the unpaid amount of such proceeds with interest thereon at the rate of twelve percent (12%) per annum, calculated from date of first sale."
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> 52 O.S.Supp.1983 §545 provides:
>
> "Proper distribution of revenues from the sale of production from the well shall be made pursuant to the provisions of Section 540 of Title 52 of the Oklahoma Statutes. If any owner receives revenues directly from the purchaser within which other owners are entitled to share ratably, the owner receiving such revenues shall forward the same to the party responsible for distribution pursuant to the provisions of Section 540 of Title 52 of the Oklahoma Statutes."

concerning the date of production and the date of entry into a gas purchase contract as such dates relate to the effective dates of the Act and the Commission's Rules. Common to each of these Rules is the provision that "each contracted party shall distribute revenues, pursuant to the provision of 52 O.S. 1981 § 540 [amended 1985], to such non-contracted parties to the extent of that party's interest in the revenue from the sale of each contracted party's gas production sold."[44]

Section 540 expressly governs the payment of royalties on production from an oil or gas unit. The obligation for payment of royalties is placed initially on the first purchaser of production. However, a first purchaser may be exempted from this obligation if it enters into an arrangement with an "owner of the right to drill and to produce under an oil and gas pooling order" and such owner assumes the obligation. Seal initially maintains the quoted language creates two distinct classes of owners qualified to assume the obligation--lessees in units not subject to force pooling and operators of force pooled units. Although Seal inconsistently later asserts that an operator is the only proper party to substitute for a first purchaser under Section 540 regardless of whether a unit is voluntarily pooled or forced pooled. Seal argues Rules 6-101, 6-102 and 6-103, in their references to the responsibilities of contracted parties to make distribution of production proceeds to non-contracted parties, ignore the provisions of Section 540 which, under its interpretation, only operators may be substituted for first purchasers in assuming responsibility for payment.

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[44] Rules 6-101(D), 6-102(C)(3) and 6-103(D). See also Rules 6-101(F), 6-102(E) and 6-103(D) which require the contracted parties to distribute revenues to the non-contracted parties pursuant to Section 52 O.S.Supp.1985 §540.

Upon a proper reading of the Rules as they relate to Section 540, it is clearly demonstrated that no conflict exists. Under the plain meaning of Section 540, an owner of the right to drill, whether such right was acquired by lease or by force pooling, may be substituted for the first purchaser in taking responsibility for royalty payments under a suitable arrangement. Rules 6- 101(F), 6-102(E) and 6-103(F) provide that the contracted party shall pay or cause to be paid to the non-contracted party its share of such proceeds. Each contracted party is an "owner in an oil or gas well who is a party to a contract for the sale of gas produced from that oil or gas well."[45] A contracted party will either have assumed the obligation of disbursement of gas production proceeds pursuant to Section 540 or such responsibility will be left upon the first purchaser, depending upon the terms of a particular gas purchase contract.

[22] Seal also relies on its erroneous construction of Section 540 in arguing Rule 6-107 is violative of the requirements of Section 540. Rule 6-107(A) requires each working interest owner to be responsible for payment of all royalties, overriding royalties and other payments for which it is obligated by law, lease or contract. However, Rule 6-107(B) allows an interest owner to enter into an agreement for the manner in which actual disbursement will be made and the party who will make such disbursement. Based upon a proper interpretation of Section 540, we find Rule 6-107 is also valid.

[23] Section 540(A) additionally imposes a time frame requirement for distribution of revenues that gas production proceeds be paid to the persons legally entitled thereto,

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[45]Rule 6-100(B)(2).

commencing, with certain exceptions, no later than six months after date of first sale, and thereafter no later than sixty days after the end of the month in which subsequent sales are made. Seal asserts that various provisions of the Rules violate the time of payment requirements of Section 540(A).[46] The Commission maintains the incorporation of Section 540 into the provisions of the Act by the Legislature was to provide a working framework for the distribution of funds between parties as production was sold. Additionally, it contends Section 540 was designed to apply to the scenerio where production has just begun, and has no application to the balancing of proceeds accrued from past sales. We disagree. We believe the Legislature in enacting Section 545 clearly incorporated the time frame provisions of Section 540 into the gas balancing scheme. We conclude the various time frames in which payment is to be made as set forth in the challenged

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[46]Rule 6-102(C)(3) provides for payment of production sold between the date of the effectiveness of the Act and the effective date of the rules "in equal monthly amounts over a period of the succeeding eight (8) months." Similarly Rule 6-103(D)(3) provides for payment, with respect to gas sold on or after the effective date of the Act and prior to the effective date of the Rules, under contracts entered into during the same period, "with equal monthly amounts over a period of time equal to the number of whole months from the date of first production ..." to the effective date of the Rules. Also, Rule 6-104(C)(1) provides that in the event a contracted party's gas contract expires, and he subsequently revenue shares, any underproduction attributable to him shall be carried forward until such time as he enters into a new contract or upon well depletion. Rule 6-104(F) requires cash balancing, without interest, on well depletion, for wells commencing production prior to the effective date of the Act.

Rules are inconsistent with the provisions of Section 540 as incorporated by Section 545 and are thus invalid.

[24] Seal's final argument with regard to Section 540 pertains to Rule 6-112 which provides that an operator or contracted party who undertakes any obligations under the Rules shall have no liability thereunder, except in the case of gross negligence or willful misconduct. It is argued that Rule 6-112 fails to give effect to Section 540(B)'s provision for an assessment of a twelve percent interest penalty on any failure to pay under the term's of Section 540(A), and is, thus, invalid. The Commission argues to the contrary, that the Legislature only intended to adopt Section 540's scheme for distribution of revenues as to the parties responsible for the distribution and did not incorporate the penal provisions of Section 540 in the Act's reference to such Section.[47] In support of this argument the Commission asserts that "[f]orfeitures or penalties cannot be created by judicial implication, but must be expressly imposed by statute."[48] We find the penalties for failure to comply with the provisions of Section 540(A) were expressly incorporated into the Act based upon the actual words of Section 545 and there is no need to create such by judicial construction. Section 545 refers to the provisions of Section 540 and does not limit the scope of incorporation of Section 540 to only Subsection A thereof. Accordingly, we find Rule 6-112 invalid insofar as it does not incorporate the penalty provisions found in Section 540(B).

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[47]*See, supra*, note 37.

[48]*Incorporated Town of Bennington v. First National Bank of Bennington*, 172 Okl. 164, 44 P.2d 872 (1935).

[25] Seal next argues Rule 6-104(E) is invalid insofar as it provides for a twenty-five percent limitation on the reduction of an overproduced contracted party's shares to achieve balancing which is allegedly contrary to the express provisions of the Act.[49] It contends this Rule affects two classes of working interest owners: (1) working interest owners who have affirmatively elected not to share in revenues after the effective date of the Act, and (2) working interest owners who are excluded from the gas balancing provisions of the Act by Rule 6-100. Seal maintains the Act does not provide for balancing in kind and if it were to be used, the Rules should have provided that all future sales proceeds are to be paid to the

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[49]Rule 6-104(E) provides:

> "Any party governed by the provisions of this Rule who ultimately enters into a contract to separately sell or dispose of his share of gas, shall not make any such contract initially effective until the first day of the second month following notice to all contracted parties. He shall thereafter be eliminated from subsequent accounting for his share of the gas to the well operator by such contracted parties. Instead, he shall then inform all contracted parties in the well that he is now a contracted party and he shall begin accounting to the well operator and to all non-contracted parties pursuant to Rule 6-101, 6-102 or 6-103. When the newly contracted party begins to take his share of gas, *plus additional make-up gas to get into balance*, in no event shall any other contracted party's share be reduced by more than twenty-five percent (25%)." (Emphasis added).

underproduced working owners and their corresponding excess royalty owners until such time as the imbalance is corrected, without a twenty-five percent limitation requirement on the overproduced working interest owners' shares. The Commission counters that such a blanket provision as urged by Seal could only be expressly imposed by the Legislature as it could unduly penalize parties who have produced their full allowable. We are not persuaded. The Rule prevents non-contracted working interest owners from achieving a balanced position in the well by impeding their balancing capabilities so that they will never be allowed to get back into balance. We hence hold the challenged portion of Rule 6-104(E) invalid.

[26] Seal argues Rule 1-108 which assesses a one percent administrative cost against each non-contracted party who elects to share in revenues is contrary to law, inequitable and deprives parties of their property without due process of law.[50] It asserts the Commission has no authority to require a

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[50]Rule 6-108 provides:

> "Each non-contracted party in a well who revenue shares under Rule 6-101, 6-102, or 6-103 shall be subject to a monthly administrative expense of one percent (1%) of that amount of revenue due and owing as payment for that month, and in no event less than Five Dollars ($5.00). Said expense shall be billed by the operator, or shall be withheld by the contracted party from the gas revenue due to the non-contracted party, unless a separate arrangement is agreed upon in writing by the parties subject hereto."

reduction in the ratable share to be distributed to non-contracting parties. The Commission seeks to justify the imposition of the assessment of administrative costs on the basis that such non-contracted parties will benefit from an imposed quasi-contractual relationship created by Section 544 and thus should bear the cost of it, citing *Welling v. American Roofing and Sheet Metal Co.*, 617 P.2d 206 (Okla.1980). It is further argued by the Commission it would be inequitable not to compensate the contracted parties for the expenses incurred in satisfying their obligation to account and to revenue share. Additionally it asserts that merely because the rate set is only an estimate of the actual costs does not mean that the rate has no actual relationship to the expenses incurred by revenue sharing. It contends the specific rate set is a reasonable estimate of administrative costs. We agree.

[27] Seal's final challenge to the Rules is concerning the negligence or willful misconduct standard in hearings before the Commission imposed by Rule 6-112. Seal seeks clarification of this Rule in relation to Section 547 which grants the Commission the power to enforce penalties for violations of the Act and also affords the right to injured parties to recover treble damages for violations of the provisions of the Act in district court. The Commission attempts to justify Rule 6-112 by asserting such Rule has no application to district court treble damage remedies authorized by Section 547. It maintains an action before the Commission to recover on liabilities from a breach of obligations imposed by the Rules is a totally separate and distinct action from one in district court for breach of the statutory duties. We find no distinction for the Rules were promulgated to administer the purpose of the Act. The practical effect of different standards for measuring liability in district court and the Commission would force parties to seek their remedies in district court where treble damages may be

recovered without fault. We find the standard for penalties to be enforced by the Commission for violations of the Act and the Rules promulgated for its administration should be that imposed by Section 547 for district court actions. We therefore find Rule 6-112 to be invalid in this regard.

VII.
CONCLUSION

We conclude that the Act is constitutional. We further affirm the provisions of the Rules challenged herein except Rules 6-104(E), 6-102(C)(3), 6-103(D)(3), 6-104(C)(1), 6-104(F) and 6-112. We find invalid Rule 6-104(E) insofar as the twenty-five percent limitation on the reduction of an overproduced contracted party's shares to achieve balancing for it impedes non-contracted working interest owners' capabilities from ever achieving a balanced position in the well. We also find the time frames in which payment is to be made found in Rules 6-102(C)(3), 6-103(D)(3), 6-104(C)(1) and 6-104(F) are inconsistent with the provisions of Section 540 as incorporated by Section 545. We further reject Rule 6-112 which requires a different standard of measuring liability for violations of the Act and Rules thereunder in actions brought in the Commission as those actions brought in district court under the authority of 52 O.S.Supp.1983 §547 for the recovery of threefold damages for violations of the Act. Moreover, Rule 6-112 fails to incorporate the interest penalty provisions found in Section 540(B) as required by Section 545. We therefore find Rule 6-112 invalid.

SIMMS, C.J., DOOLIN, V.C.J., OPALA, WILSON, KAUGER, JJ., and GRAY, Special Judge, concur.

SUMMERS, J., concurs in result.
HARGRAVE, J., dissents.

LAVENDER, J., disqualified.

HARGRAVE, Justice, dissenting. [Dissenting opinion not included.]

APPENDIX M

52 Okla. Stat. (1991) §§541 - 547.*
(Commonly referred to as the "Sweetheart Gas Bill")

§541. Purpose and intent of act

It is the purpose and intent of this act to protect the rights and correlative rights of all interest owners of natural gas wells and wells producing casinghead gas and to afford all such owners an equal opportunity to extract their fair share of gas and to sell and be paid in proportion to their interest therein. It is further the intent of this act to protect such owners against discrimination in purchases in favor of one owner as against another.

§542. Ratable sharing of revenues from sale of production - Owner's election to require operator to attempt to market owner's ratable share of production - Contract price - Other rights and remedies

A. Whenever a well producing natural gas or casinghead gas is placed into production, all owners within such well, including, but not limited to, all working interests, any interested parties having a right to produce, overriding royalty, royalty and mineral interest owners in the unit area under the well, shall be entitled to share ratably in the revenues from the sale of production from the well as set forth in the provisions of this act. This act shall not apply to the natural gas liquids extracted as a result of mechanical processing of the

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*Amended effective September 1, 1992, by Laws 1992, C190, §18 and renumbered as 52 Okla. Stat. §§581.1 - 581.10.

natural gas stream for the removal of liquid components of the methane.

B. Prior to the date of first production, the operator of the unit area shall offer by written notice to each owner of the well having the right to sell an election whereby the operator shall seek to market that owner s ratable share of gas production, or a portion thereof as designated by the owner. Each owner shall have thirty (30) days from the receipt of the notice of the offer to elect in writing to have the operator attempt to market his share of gas production. Upon receipt of these elections, the operator shall seek to timely and competitively market such owners share of the production at the best price and terms available in the area and in no event upon a price or terms less favorable than that received by the operator. Upon receipt of written notice of the terms of a bona fide offer to purchase, each owner electing to have the operator market his share of gas production shall have thirty (30) days within which to reject the same. Failure by any owner to reject the offer shall be deemed acceptance of the offer. If the operator has not secured a written bona fide offer to purchase within one hundred twenty (120) days of an owner s election, that owner may rescind such election in writing.

C. If an owner in a well does not elect to obligate the operator as provided in subsection B of this section, then that owner shall not be obligated to deliver his ratable share for sale nor shall the operator be obligated to market such share.

D. Nothing in this act shall be construed to prevent any owner or owners from receiving the price agreed upon by contract or to prevent any owner or owners from taking their share of production in kind or separately disposing of their share. This act shall not be construed to eliminate or otherwise

affect the rights and remedies available to any operator or any other working interest owner against any working interest owners, including operators, who either default or fail to pay their proportionate share of the well costs.

§543. Owners without contract to share in revenue from contracted production

A. For wells producing or capable of producing natural gas or casinghead gas on and after the effective date of this act, in the event that one or more owners in a well receives a contract for the sale of only their portion of the gas production from the well to the exclusion of other owners in the well, all owners having no contract shall be entitled to share ratably in the revenue from the sale of each contract s production to the extent of their net revenue interest, except for any owner who elects or has elected in writing not to so sell. This act shall not be construed to prevent any owner from receiving the price agreed upon by contract.

B. Each owner receiving a contract to sell as described in subsection A of this section shall send written notice of the terms of the contract to all other net revenue interest owners not having an existing contract for the purchase of their share of the gas production. Said owners shall have thirty (30) days from the receipt of the notice of the terms of the contract to elect in writing not to deliver their ratable share of gas production for sale. Failure by any owner to give said written notice shall be deemed acceptance by that owner of the terms of the contract and said owner shall deliver his ratable share of production for sale.

§544. Amount of gas produced daily - Ownership - Benefits - Accounting for disposition - Sharing of revenues

On and after the effective date of this act, an owner of a well producing natural gas or casinghead gas may produce daily from the well that amount of gas which may be lawfully produced therefrom. The amount of gas produced daily, irrespective of the owner producing, belongs to, is owned by, and shall inure to the benefit of each owner in the well in proportion to each owner's interest in the well. Each owner who produces natural gas or casinghead gas and who separately sells or otherwise disposes of the gas must account to each other owner in the well not selling or otherwise disposing of gas from the well for that owner's part of the gas so disposed of or sold. In addition, each selling or disposing owner must compensate each owner not selling or disposing of gas from the well for that owner's proportionate part of the gas disposed of or sold.

§545. Distribution of revenues from sale of production

Proper distribution of revenues from the sale of production from the well shall be made pursuant to the provisions of Section 540 of Title 52 of the Oklahoma Statutes. If any owner receives revenues directly form the purchaser within which other owners are entitled to share ratably, the owner receiving such revenues shall forward the same to the party responsible for distribution pursuant to the provisions of Section 540 of Title 52 of the Oklahoma Statutes.

§546. Construction and application of act

Nothing in this act shall be construed as setting the price, terms or conditions under which a purchaser takes the production of a well or setting any restrictions, limitations, floor or ceiling on the price to be paid for such production, nor shall anything in this act require any purchaser to connect any well that such purchaser is not already obligated to connect and nothing contained in this section shall be construed as altering or changing the definition of the terms common purchaser and common carrier as defined by law.

§547. Corporation Commission empowered to promulgate rules and regulations - Judicial remedies

The Corporation Commission is herein empowered to promulgate rules and regulations by which the purpose of this act shall be administered, including the power to establish and enforce penalties for violations thereof. Such power shall supplement the existing authority of the Corporation Commission to provide for a ratable taking of gas to protect the correlative rights of those entitled to take from a common reservoir or common source of supply, including the exercising of the authority to enforce balancing in kind. Such power shall not preclude the remedies available through the district courts as provided by existing law nor preclude the right, herewith granted, of any owner who is injured in business or property by any other owner in the well by reason of any action in violation of the provisions of this act to sue in the courts of this state and to recover threefold the damages so sustained, the costs of the suit, and reasonable attorneys fees to be fixed by the court.

APPENDIX N

CONSTITUTIONAL PROVISION

U.S. Const. Amend. XIV Section 1

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

No. 96-117

In The

Supreme Court of the United States

October Term, 1995

CHESTER MAXWELL, GRACE MAXWELL BROWN, EWELL E. CAUDLE, WAUNETTE JOHNSON, JAMES A. MAXWELL, PAISY DAVENPORT and BILL MAXWELL,

Petitioners,

vs.

SAMSON RESOURCES COMPANY,

Respondent.

On Petition For Writ Of Certiorari
To The Court Of Appeals Division No. III
State Of Oklahoma

RESPONSE TO PETITION FOR
WRIT OF CERTIORARI

James A. Kee
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101 Park Avenue, Suite 800
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Attorney for Respondent

QUESTIONS PRESENTED

1. Whether this Court will decide Constitutional issues that allegedly arise from a state court proceeding where the issues were not raised in, nor decided by, the state courts?

2. Whether a person has a property interest protected by the Due Process Clause of the Fourteenth Amendment in a claim for treble damages under a penalty statute that has been repealed before final judgment?

3. Whether any procedural due process was not afforded Petitioners?

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI

Respondent ("Samson") respectfully offers its Response to the Petition for Writ of Certiorari filed by Petitioners ("the Maxwells").

JURISDICTION

As explained below, the Maxwells did not raise the Constitutional issues they raise here in the Oklahoma courts nor were these issues passed upon below. To the extent this Court considers this omission jurisdictional rather than prudential, jurisdiction would be lacking.

I.

STATEMENT OF THE CASE

A. Facts Showing Why the Maxwells Were Not Paid Proceeds.

The Maxwells' Statement of the Facts make it appear as though there was never a reason why the Maxwells did not receive proceeds. Pursuant to Rule 15 of this Court, Samson offers the following to correct this misstatement of fact.

This case arose when the Maxwells claimed to own the same mineral interest in a producing gas well ("the Kinnikin well") that Kerr-McGee Corporation ("Kerr-McGee") also claimed it and its lessor ("Allen") owned. Samson operated the Kinnikin well, which is located in

Pittsburg County, Oklahoma, pursuant to a joint operating agreement ("JOA") with Kerr-McGee and others. DX 20A.

Prior to drilling the Kinnikin well, and pursuant to the terms of the JOA, Samson as operator obtained a title opinion which revealed a potential defect in the title of Kerr-McGee and Allen. DX 19A. In 1967, Allen had obtained her mineral interest by assignment from the Maxwells' brother,[1] Buster Maxwell, who in turn had acquired the mineral interest from the Maxwells' mother, Louise Maxwell. *Id.* The potential title defect was that the Maxwells' father, George S. Maxwell, had record title to the mineral interest when he died in 1960 and there was nothing in the title records showing that his title devolved to his wife, Louise. *Id.*

Samson as operator gave Kerr-McGee the title opinion and discussed with Kerr-McGee the title examiner's concern with its lease. 9/20/93 Tr., at pp. 53-58, and DX 21A. Kerr-McGee informed Samson that it was comfortable with its title and Kerr-McGee then warranted its title in the JOA. *Id.* and DX 20A.

In early September, 1985, one year and seven months after first sales from the Kinnikin well, Samson received a letter from the Maxwells' attorney at the time, Robert Ivester. DX 3A. The letter enclosed a copy of a Default Judgment dated July 5, 1985, which purported to quiet

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[1] Not all of the Maxwells are siblings. Some are the surviving children of deceased siblings. For convenience purposes, Samson describes the Maxwell family relationships as if the Maxwells were all siblings.

title in the Maxwells to a portion of the mineral interests Mr. Maxwell owned in the Kinnikin unit at his death in 1960. DX 4A. In the default judgment proceeding, the Maxwells claimed that their father died intestate in 1960 and, therefore, that two-thirds of his property passed at his death to his children rather than to Louise. *Id.*

The Maxwells' attorney, Mr. Ivester, also authored the 1983 title opinion relating to the Kinnikin well that contained the exceptions relating to the Kerr-McGee lease and Allen's mineral interest. DX 19A. Although Mr. Ivester had actual and record notice of Kerr-McGee's purported lease covering the Maxwells' mineral interests, Kerr-McGee was *not* made a party to the default judgment proceeding. DX 4A. Also, even though Allen was a living person, she was served by publication notice in the default judgment proceeding. 9/20/93 Tr., at p. 10.

The Maxwells filed this case in March, 1987. Neither Kerr-McGee nor Allen were named in the suit. On the same day suit was filed, Kerr-McGee indicated it had not conceded that the Maxwells' title claim was valid. DX 14A. Because Kerr-McGee never agreed to the Maxwells' claim and because Kerr-McGee was never a party to a proceeding that affected its purported title, Samson as operator did not pay the Maxwells their working interest share of revenues until final judgment was entered against Samson in this case. *Id.*

The proof at the original trial did not focus upon whether Samson's conduct had been wrongful. Three of the Maxwells testified at the original one-day, non-jury trial held May 16, 1988, and their testimony spans eighteen transcript pages. 5/16/88 Transcript, at pp. 48-66.

None of the Maxwells ever indicated that they felt that Samson had withheld information or attempted to cheat them in lease discussions. *Id.* In fact, this subject came up only once, in a question posed *by Samson's attorney. Id.* at pp. 62-63. James Maxwell merely acknowledged that the lease offer had been made and that he declined it because he wanted to participate in the well. *Id.*

Following the trial, the Pittsburg County district court awarded the Maxwells over $275,000.00 in unpaid gas revenues attributable to the Maxwells' purported mineral interest and over $116,000.00 in interest and penalty interest. The district court then trebled this amount pursuant to the treble damage provision contained in 52 Okla.Stat. (1983) §547, and additionally awarded the Maxwells over $780,000.00 as a penalty. The district court judge commented that he was unsure whether Samson had intended to cheat the Maxwells, then he expressly stated that he did not have to make a finding regarding whether Samson's conduct warranted punishment before imposing the penalty.

B. Facts Showing the Constitutional Issues Were Not Raised Nor Passed Upon Below.

On appeal, Samson raised numerous arguments, including the contention that the evidence did not show wrongful conduct justifying the penalty. While the appeal was pending, the treble damage statute upon which the Maxwells' treble damage claim was based was repealed. The Oklahoma Supreme Court ultimately affirmed the award as it related to unpaid revenues and affirmed most of the award of interest and penalty interest. However,

the court reversed the treble damage award because it found that the treble damage statute required a finding of wrongdoing before treble damages could be imposed. In its opinion, the court recognized and relied in part upon the repeal of the treble damage statute. Contrary to the Maxwell's assertions here, the court indicated that its holding that fault was a necessary element of a claim for a statutory penalty was not a change of Oklahoma's prior law. The Maxwells did not petition the court for rehearing.

Following this opinion, Samson paid to the Maxwells about $600,000.00, the affirmed portion of the award and postjudgment interest. On remand, however, the Maxwells requested that the district court reinstate the treble damage award. *See*: Plaintiffs' Motion to Supplement Judgment by Entering a Finding of Wrongful Intent on the Part of Defendant Samson and Brief in Support filed 6/22/93. Samson's response included the contention that the Oklahoma Supreme Court's mandate did not contemplate further consideration of the treble damage issues. *See*: Defendant's Brief at pp. 15-16, filed 7/2/93. In their response to this contention, the Maxwells did *not* raise any Constitutional issue relating to their alleged right to continue their pursuit of the statutory penalty. *See*: Plaintiffs' Response to Defendant's Brief in Opposition to Plaintiffs' Motion to Supplement Judgment by Entering a Finding of Wrongful Intent on the Part of Defendant Samson, filed 7/6/93.[2]

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[2] The Maxwells also did not raise any Constitutional issue in their Summary of the Issues and Argument filed in the district court on October 13, 1993. *See*: pp. 5-7 for the Maxwell's

Following remand, another one-day hearing was held before the trial judge. The Maxwells, who did not even appear for this hearing, presented only the transcript of the one-day trial held in 1988. Samson presented evidence showing that its conduct was not wrongful and, contrary to the Maxwells' contention here, that evidence was not impeached. Nevertheless, the district court found that Samson's conduct justified treble damages. The trial court then imposed a $1.1 million penalty against Samson.[3]

On appeal from this judgment, Samson raised the following issues:

1. Whether the Oklahoma Supreme Court intended for the trial court to revisit the issue of treble damages on remand.

2. Whether the Act repealing the treble damage statute applied to pending claims not yet reduced to final judgment.

3. Whether the evidence justified a penalty in the first instance.

4. Whether the trial court erred in interpreting and applying the treble damage provision as follows:

    a) As applying at all to the situation of an unleased owner who is already entitled

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discussion concerning whether the Oklahoma Supreme Court's mandate contemplated further consideration of treble damages.

[3] The treble damage penalty increased over $350,000.00 from the first judgment because the trial court trebled post-judgment interest that ran while Samson successfully pursued its first appeal.

to share in the producing owners' net profits.

b) As requiring the trebling of all unpaid revenues, prejudgment interest and post-judgment interest, rather than the trebling of injury to "business or property" caused by specific violations of the Sweetheart Gas Bill.

c) As allowing conduct not violative of the Sweetheart Gas Bill to justify treble damages.

d) As not allowing for a month-to-month or at least period-by-period examination of whether Samson's conduct during each period was sufficiently morally reprehensible to justify punitive damages.

In its Petition in Error and Brief-in-Chief, Samson specifically argued that the Oklahoma Supreme Court's mandate following the original Appeal did not contemplate further consideration of treble damages. *See*: Petition in Error filed 8/15/94 at Exhibit "C", ¶1, and Brief-in-Chief filed 5/1/95, at pp. 19-20. In their Answer Brief, the Maxwells did not raise any Constitutional issue. *See*: Answer Brief filed 6/15/95. In fact, the Maxwells did not respond at all to Samson's contention that the Oklahoma Supreme Court's original mandate did not contemplate further consideration of treble damages. *Id.*

The Oklahoma Court of Appeals then reversed the district court's reentry of the treble damage award because it found that the Oklahoma Supreme Court's prior mandate did not contemplate further consideration of treble damages on remand. App. 2a-9c. The Oklahoma

Court of Appeals did not reach the other issues raised by Samson on appeal. In their Petition for Rehearing, the Maxwells again did not claim a Constitutional right to pursue treble damages on remand. App. 61a-67a.

The title of the sole proposition in the Petition for Rehearing, which portion of the petition has been omitted from the redacted version in the Maxwell's Appendix, was as follows: "In Remanding the Case for Further Proceeding the Oklahoma Supreme Court Acted in Accord With *the Practice* of the United States Supreme Court." *See*: Petition for Rehearing filed 11/13/95, at p. 3. (emphasis supplied). The Maxwells cited opinions from this Court wherein the Court has remanded punitive damage awards for further consideration in light of recent pronouncements by the Court. The Maxwells argued that the Oklahoma Supreme Court had followed such *a practice* in its prior opinion, not that their Due Process rights had been violated. App. 62a-67a.

Following the denial of their Petition for Rehearing, the Maxwells then sought discretionary review from the Oklahoma Supreme Court. Again, however, the Maxwells failed to raise a Constitutional issue in their Petition for Certiorari. App. 69a-88a. Instead, the Maxwells made the same argument that the Oklahoma Supreme Court had intended in its original mandate to follow *the practice* of this Court and other courts in remanding punitive damage awards for further consideration in light of recent pronouncements. *Id.* at 81a-87a. The Oklahoma Supreme Court denied discretionary review.

II.

THE CONSTITUTIONAL ISSUES RAISED BY PETITIONERS WERE NOT RAISED BY THE MAXWELLS BELOW NOR WERE THEY PASSED UPON BY THE OKLAHOMA COURTS.

Despite having had numerous opportunities to do so, Petitioners ("the Maxwells") never raised in the state court proceedings the Constitutional issues addressed in the Petition for Writ of Certiorari. Thus, neither the state district court nor the appellate courts decided the Constitutional questions that the Maxwells raise here. It is, of course, well settled that the Court will not consider Constitutional issues not raised nor passed upon in the underlying proceedings. *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 76 (1988).

As shown above in the Statement of the Case, the Constitutional issues raised here by the Maxwells were not raised nor passed upon below in the district court, the Oklahoma Court of Appeals or the Oklahoma Supreme Court. The Maxwells only briefly address this problem in their Petition for Writ of Certiorari, at p. 10. They contend that it was an "unexpected decision" when the Oklahoma Court of Appeals reversed the district court's reentry of treble damages because the initial appellate mandate did not contemplate further consideration of treble damages. However, as shown above, this ultimately dispositive issue was raised by Samson throughout the district court and appellate proceedings following the initial mandate. Despite having had every opportunity to raise Constitutional issues, the Maxwells simply failed to do so. The Petition for Writ of Certiorari should be summarily denied.

III.

A CLAIM TO ENFORCE A STATUTORY PENALTY REPEALED PRIOR TO FINAL JUDGMENT IS NOT A PROPERTY INTEREST PROTECTED BY THE FOURTEENTH AMENDMENT.

The requirements of procedural due process do not apply to the deprivation of every conceivable type of property interest. *Board of Regents v. Roth*, 408 U.S. 564, 576-78 (1972). A claimant's abstract interest in seeking a recovery is, without more, not sufficient to constitute a property interest protected by the Fourteenth Amendment. *Id.* at 577. Rather, a legitimate and enforceable claim to the recovery must exist. *Id.*

The Oklahoma Legislature repealed the treble damage provision upon which the Maxwells' claim was based before a final, non-appealable judgment was entered in this case. The Production Revenue Standards Act ("the New Act") 52 O.S.A. (1995 Supp.) §570.1, *et seq.*, which became effective September 1, 1992, did not contain a treble damage provision. *Id.*; *See also*: Session Laws 1992, c. 190, §29. The New Act, at §570.3, provided as follows:

> §570.3 Application of Act
>
> The Production Revenue Standards Act shall apply to all owners and shall apply to all producing wells, regardless of the date pooled, drilled or of the date of the underlying leases. . . .

Without question, the Oklahoma Legislature had every right to apply the repeal of the treble damage provision to pending cases. "[W]ith apparently no adjudicated exceptions," courts have held that a plaintiff has no

right to recover a statutory penalty that is repealed prior to the plaintiff obtaining a final, non-appealable judgment. *Kelly v. Hall*, 191 Ga. 470, 12 S.E.2d 881, 883 (1941).

The following is stated in *Kelly, supra*, 12 S.E.2d at 883:

> . . . Nor is there any rule of law that would preclude the legislature from abolishing a penalty before a judgment has been rendered thereon. With apparently no adjudicated exceptions, it is the rule, that, until judgment is rendered, a plaintiff has no vested right to punitive damages, and accordingly, the right to such damages may be taken away by a statute taking effect after a verdict but before judgment has been rendered thereon. (cites omitted).

Cases before and after *Kelly* have, without exception, followed the rule that a plaintiff has no vested right to recover a statutory penalty.[4]

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[4] *Ewell v. Daggs*, 108 U.S. 143, 150 (1883) (Repeal of statute imposing usury penalty did not impair vested rights); *American Savings Life Ins. Co. v. Financial Affairs Management Co., Inc.*, 20 Ariz.App. 479, 513 P.2d 1362, 1367 (1973) (same); *Orden v. Crawshaw Mortgage & Inv. Co., Inc.*, 109 Cal.App.3d 141, 144, 167 Cal.Rptr. 62 (1980) (same); *Smith v. Printup*, 866 P.2d 985, 994 (Kan. 1993) (Legislature can abolish punitive damages without infringing any Constitutional right); *McConwell v. FMG of Kansas City, Inc.*, 861 P.2d 830, at Syllabus by the Court ¶10 and p. 846-47 (Kan.App. 1993) (There is no vested right in recovering punitive damages); *Gordon v. State*, 608 So.2d 800 (Fla. 1992), *cert. denied*, 123 L.Ed.2d 268 (There is no protectable right at all in recovering punitive damages); *Tel Service Co., Inc. v. General Capital Corp.*, 227 So.2d 667, 670 (Fla. 1969) (Repeal of statutory penalty applies even if an appeal from the judgment is pending); *Ross v. Gore*, 48 So.2d 412, 414 (Fla. 1950) (There are no

The rationale of these cases is that statutory penalties are not a right of the plaintiff. A plaintiff's rights are satisfied with a recovery of compensatory damages. The penalty legislation merely grants a plaintiff a windfall that aids in the enforcement of a particular legislative policy. Because a plaintiff has no vested right to recover a statutory penalty, the legislature is free to repeal the windfall at anytime before a final, non-appealable judgment has been rendered.

Oklahoma adheres to the same principles[5] that have been universally applied by other courts to hold that a

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vested rights to punitive damages before judgment); *Mack Trucks v. Conkle*, 263 Ga. 539, 436 S.E.2d 635, 638-39 (1993) (There are no vested or Constitutional rights to punitive damages); *State Farm Mutual Automobile Ins. Co. v. Young*, 207 Ga.App. 355, 427 S.E.2d 835, 836 (1993) (same); *Terry v. State Farm Mutual Automobile Ins. Co.*, 205 Ga.App. 224, 422 S.E.2d 212, 214 (1992) (same); *Georgia Ports Authority v. Hutchinson*, 209 Ga.App. 726, 434 S.E.2d 791 (1993) (same); *Siegall v. Solomon*, 19 Ill.2d 145, 166 N.E.2d 5, 8 (1960) (same); *Smith v. Hill* 12 Ill.2d 588, 147 N.E.2d 321, 324 (1958) (same); *Mattyasovsky v. West Towns Bus Co.*, 21 Ill.App.3d 46, 313 N.E.2d 496, 502 (1974) (same); *White v. Prenzler*, 19 Ill.App.2d 231, 153 N.E.2d 477, 480 (1958) (same); *Shepherd Components, Inc. v. Brice Petrides-Donohue & Assoc., Inc.*, 473 N.W.2d 612, 619 (Iowa 1991) (same); *Bejger v. Zadadzki*, 252 Mich. 14, 232 N.W. 746, 747 (1930) (same); *Vaughn v. Taft Broadcasting Co.*, 708 S.W.2d 656, 660 (Mo. 1986) (same); *Meech v. Hillhaven West, Inc.*, 776 P.2d 488, 504 (Mont. 1989); *Couglin v. Hilton Hotels Corp.*, 1995 W.L. 131845, p. 6 (D.Nev. 1995) (same); *Convention Center Inn, Inc. v. Dow Chemical Co.*, 19 Ohio Misc.2d 15, 484 N.E.2d 764, 767 (1984); *Langford v. Vanderbilt Univ.*, 199 Tenn. 389, 287 S.W.2d 32, 34 (1956) (same).

[5] Oklahoma follows the general rule that a statute which merely affects a remedy, as opposed to a right, does not affect vested rights. *Trinity Broadcasting Corp. v. Leeco Oil Co.*, 692 P.2d 1364, 1367 (Okla. 1984). If a procedural statute is changed

litigant can no longer recover exemplary damages if a penal statute is repealed during the course of a proceeding before final judgment. Here, the Maxwells' vested rights were satisfied through their recovery of $600,000.00 in actual damages, interest and penalty interest.

In the trial court on remand, the Maxwells successfully contended that the holding of *Majors v. Good*, 832 P.2d 420 (Okla. 1992), allowed them to pursue treble damages under the repealed statute. The question

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during the course of a proceeding, the right of the party relying on the statute "depends upon [the] statute in force at termination of [the] action, and not upon [the] statute in force at [the] commencement of [the] action." *Jeffcoat v. Highway Contractors, Inc.*, 508 P.2d 1083, 1086 (Okla.App. 1972), quoting *Igoe Brothers v. National Surety Co.*, 112 N.J.L. 243, 169 A. 841 (1934); *See also*: *Texas County Irrigation and Water Resources Assoc. v. Oklahoma Water Resources Board*, 803 P.2d 1119, 1122-23 (Okla. 1990) (No one has a vested right in the mode in which a right is enforced and, thus, even if a statute affecting the remedy is changed between judgment and appeal, the appellate court will apply the statute presently in effect). *See also*: *Oklahoma Water Resources Bd. v. Central Oklahoma Master Conservancy Dist.*, 464 P.2d 748, 756 (Okla. 1969) (No one has a vested right in how a right is enforced and statutes affecting how a right is enforced are generally applied retroactively).

The Oklahoma Supreme Court, in its first opinion in this case, recognized that treble damages are penal and are imposed for the benefit of society. 848 P.2d at 1172-73, citing *Oller v. Hicks*, 441 P.2d 356, 360 (Okla. 1967). This was consistent with its prior decisions holding that exemplary damages are highly penal and are imposed for society's benefit, not the benefit of the plaintiff. *See, e.g., Slocum v. Phillips Petro. Co.*, 678 P.2d 716, 719 (Okla. 1983). In fact, the plaintiff is "whole and complete with actual damages" and has only "an incidental personal interest" in exemplary damages. *Id.*

decided in *Majors* was whether a 1986 amendment to Oklahoma's general punitive damage statute, 23 O.S. §9, should apply to an action that arose in 1984 but was tried in 1989. The Oklahoma Supreme Court held that the 1986 amendment to §9 applied prospectively only. *Id.* at 422.

The holding in *Majors*, however, did not apply to this case for two reasons. First, the Oklahoma Legislature had not provided in its 1986 amendment to §9 whether the amendment applied retroactively. Thus, unlike this case, a determination of legislature intent was required.[6] The second difference between *Majors* and this case was that *Majors* involved amended punitive provisions, not a repeal of punitive damages altogether.[7]

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[6] *See*: *Houck v. Hold Oil Co.*, 867 P.2d 451, 457 (Okla. 1993) (" . . . [W]hether to give a statute prospective or retroactive effect should be controlled by the fundamental or transcendent canon of statutory construction, to wit: to give effect to the legislative design."). In this case, the New Act that repealed the treble damage provision expressly provided that it applied to all owners and wells regardless of when drilled. Thus, unlike in *Majors*, an interpretation of whether the Oklahoma Legislature intended for the New Act to apply, as opposed to the old law, the Legislature's express language would be applicable.

[7] In §9, the Oklahoma Legislature had merely amended how unlimited punitive damages could be recovered; it did not eliminate them altogether. Thus, no strong legislative disfavor with the concept of applying old §9 to prior cases was apparent. Here, however, in addition to the express provision applying the New Act retroactively, the total abolition of treble damages reveals a strong legislative disfavor with treble damages in cases such as this one. In fact, in its prior opinion in this case, the Oklahoma Supreme Court gave "due weight to the Legislature's recent repeal of multiple damages in cases such as this one." 848 P.2d at 1173.

The Maxwells had no property interest at all protected by the Due Process Clause of the Fourteenth Amendment in pursuing a statutory treble damage claim that was repealed prior to the Maxwells obtaining final, non-appealable judgment. Thus, the Maxwells were not entitled to procedural due process in the state court proceedings and their Petition for Writ of Certiorari should be denied.

IV.

EVEN IF A PROTECTED PROPERTY INTEREST WERE INVOLVED, THE MAXWELLS RECEIVED PROCEDURAL DUE PROCESS.

The Maxwells have a difficult time defining what procedures mandated by due process they were denied. The Maxwells point to no Oklahoma law or court rule relating to appeals in general or to proceedings on remand that would violate due process on its face. Instead, the Maxwells apparently argue that, as applied in this case, Oklahoma's appellate procedures violated the Maxwells' procedural due process rights.

The concept that due process requires an opportunity to pursue a claim on remand from an appeal is novel. Because the Due Process Clause does not even require that an initial appeal right be given to a litigant, it is difficult to imagine that it would require a remand right. *U.S. v. MacCollum*, 426 U.S. 317, 323 (1976). At any rate, it is apparent that the Maxwells in fact received procedural due process on remand.

Procedural due process guaranties the opportunity to be heard, not a favorable decision. *Boddie v. Connecticut*,

401 U.S. 371,\378 (1971); *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 680 (1972). An erroneous decision on a question of state law does not support a due process claim. *Brinkerhoff-Faris*, 281 U.S. at 680. A due process claim does not arise even if a court " . . . has overruled principles or doctrines established by previous decisions upon which a party relied. . . . " *Id.*

The Maxwells received every opportunity, and exercised all but two of them, to be heard upon the question of whether the Oklahoma Supreme Court's initial opinion contemplated further consideration of treble damages under the repealed statute on remand. Although they did not do so, following the initial opinion, the Maxwells could have petitioned the Oklahoma Supreme Court for rehearing to clarify this issue. *See*: Rule 29, Rules of the Supreme Court of Oklahoma.

On remand, the Maxwells successfully argued to the district court that they were entitled to proceed on remand. Although they did not do so, in the briefing of the second appeal, the Maxwells should have responded to the argument contained in Samson's Brief-in-Chief that the initial mandate did not contemplate further consideration of treble damages on remand. Following the Oklahoma Court of Appeals' opinion adverse to the Maxwells on this issue, the Maxwells did exercise their right to be heard on this issue by filing a petition for rehearing and a petition for certiorari in the Oklahoma appellate courts.

The Maxwells incorrectly claim that the Oklahoma Supreme Court changed prior law in its first opinion when it found that fault was a requisite element of the statutory treble damage claim. While the contention

seems irrelevant to the due process analysis, it is not correct in any event. As the Oklahoma Supreme Court itself discussed in its original opinion in this case, Oklahoma law had long required a finding of fault to support the imposition of a statutory penalty.

The Maxwells' reliance on cases from this Court which have remanded punitive damages for further consideration in light of recent pronouncements is misplaced. First, the remands are made for prudential reasons; they are not Constitutionally required. Second, there is obviously a vast difference between the appellate review required before a civil fine can be upheld and the review required before a civil fine can be reduced or reversed. A defendant appealing the imposition of a significant civil penalty has a definite property interest demanding due process protection. On the other hand, as universally noted by the courts, an individual plaintiff has little interest in the windfall obtained by the recovery of a statutory penalty. *See*: cases cited, *supra*, notes 4 and 5.

It is clear that the Maxwells received every opportunity to be heard. The Maxwells are in reality complaining of what they perceive as an incorrect decision by the Oklahoma appellate courts, not a denial of an opportunity to be heard. Because the Due Process Clause does not protect against the alleged misapplication of state law, the Petition for Writ of Certiorari should be denied.

Supreme Court, U.S.
FILED
SEP 10 1996
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(3)

No. 96-117

Supreme Court of the United States

October Term, 1995

CHESTER MAXWELL, GRACE MAXWELL BROWN, JEWELL E. CAUDLE, WAUNETTE JOHNSON, JAMES A. MAXWELL, PATSY DAVENPORT, and BILL MAXWELL,

Petitioners,

vs.

SAMSON RESOURCES COMPANY,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeals Division No. III State of Oklahoma

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REPLY TO RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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Pursuant to Rule 15(6) of the Rules of this Court, petitioners (hereinafter referred to as "the Maxwells") respectfully reply to the new points raised by respondent Samson Resources Company (hereinafter referred to as "Samson") in the brief in opposition to the petition for writ of certiorari filed by the Maxwells.

I

Samson Had a Statutory Duty to the Maxwells Which Could Not Be Shifted to Kerr McGee

The Maxwells are the heirs of George S. Maxwell who died intestate February 4, 1960. Samson is the operator of the Kinnikin gas well which was drilled on lands in which George S. Maxwell owned an undivided interest in the minerals. Samson entered into an agreement with Arkla Energy Resources, the initial purchaser of production from the Kinnikin well, whereby Arkla paid all proceeds from the sale of production from the well to Samson and Samson agreed, pursuant to 52 Okla. Stat. §540 (modified and recodified as 52 Okla. Stat. §570.10), to pay the proceeds to persons legally entitled to receive them. As the operator of the Kinnikin well, Samson also had a statutory duty pursuant to 52 Okla. Stat. §§541-47, "the Sweetheart Gas Bill" (modified and recodified as 52 Okla. Stat. §§581.1-581.10) to market the Maxwells' share of the gas produced from the Kinnikin well.

In its brief in opposition to the Maxwells' petition, Samson raises new points in an attempt to justify the breach of its statutory duties to pay the Maxwells their proportionate share of the proceeds from the Kinnikin well. In the Statement of the Case, Samson purports to correct a "mis-statement of

fact" in the Maxwells' petition regarding the reason the Maxwells did not receive proceeds from the sale of gas from the Kinnikin well. Samson tries to place the responsibility on Kerr McGee by contending that the Maxwells claimed to own the same mineral interest in the well that Kerr-McGee Corporation, as lessee, and F. E. Allen, as lessor, also claimed to own. Samson acknowledges that the preliminary title opinion for the Kinnikin well, which was prepared for Samson in January of 1983, revealed a defect in the title of F. E. Allen and Kerr-McGee. The preliminary title opinion described the instruments by which Louise Maxwell, the wife of George S. Maxwell, and Buster Maxwell, the son of George S. Maxwell, conveyed *their* interests in the mineral property. As a requirement of the title opinion, Samson was advised that it should determine whether there were other successors/heirs of George S. Maxwell in addition to Louise and Buster Maxwell. Samson ignored this advice in January 1983 and again in March 1984 when the same requirement was repeated by the attorney who prepared the division order title opinion.

In August 1985, Samson received the Journal Entry of Judgment quieting the Maxwell's title to their interest in the mineral property and thus had actual notice that the Maxwells' interest in the Kinnikin well had been judicially determined. However, Samson did not contact the Maxwells about marketing their share of the gas produced from the well. Samson withheld information from the Maxwells about the proceeds of production sold from the well. Despite repeated demands for payment of all monies owed to them, Samson did not pay the Maxwells anything for their working interest share of the proceeds of production from the well. Samson did not even pay the Maxwells their royalty interest share of production until after the Maxwells filed their lawsuit in March of 1987. Samson did not pay the Maxwells any of their

working interest until May of 1993. Samson held the Maxwell's money and instigated systematic efforts to keep the working interest portion for itself. See App. 47a-55a in which the trial court stated:

> Extensive evidence was presented as to the acts of the parties and their dealings with each other at the original hearing and the Court has reviewed the testimony presented at that time. Much of that testimony, particularly as it dealt with any wrongful actions, was repeated in the rehearing of this case and extensive arguments were made based on the testimony presented.

The court concluded that the Maxwells are entitled to treble damages based on the misconduct of Samson. The court referred to Samson's acts and omissions, including those stated above, which supported the finding that "Samson negotiated with the plaintiffs in bad faith, ..." App. 54a.

Samson argues that it failed to pay the Maxwells their proportionate share of the proceeds of production from the Kinnikin well because Kerr-McGee had warranted its title in the Joint Operating Agreement and it was Kerr McGee's responsibility to cure the title defect. Samson made this same argument in the courts below. In *Maxwell v. Samson Resources Co.*, 848 P.2d 1166 (Okla. 1993), the Oklahoma supreme court rejected Samson's argument that the Joint Operating Agreement obligated Kerr-McGee, not Samson, to cure the subject title defects. The court stated:

> This agreement, of course, cannot excuse Samson from its duties as operator under the

> *provisions of the* Oklahoma statutes. *Id.* at 1168 (footnote omitted).

App. 32a. There is no justification for Samson's breach of its statutory duties to market the Maxwells' share of gas produced from the Kinnikin well and pay the Maxwells their proportionate share of the proceeds from the sale of production from the well. Samson's purported clarification of the facts is only a self serving attempt to avoid responsibility for its failure to abide by its own agreement and the law of the State of Oklahoma.

II

Samson's Argument that Repeal of the Treble Damages Provision of the Statute Should Be Applied Retroactively Is Not Supported By Oklahoma Law

In its brief in opposition to the Maxwells' petition, Samson raises the argument that the repeal of the treble damages provision of "the Sweetheart Gas Bill" applies retroactively to the Maxwells' claims. Samson's argument is contrary to Oklahoma law which provides that statutory limitations on damages, as well as statutory enhancement of damages, are changes in substantive rights and not mere remedial changes subject to retroactive application. *Thomas v. Cumberland Operating Co., 569 P.2d 974 (Okla. 1977).*

In the case of *Majors v. Good*, 832 P.2d 420 (Okla. 1992), the issue before the court was whether the amended version of the punitive damages statute, 23 Okla. Stat. §9, which provided for a cap on the amount of punitive damages, should be applied retroactively. Even though there was no dispute that the plaintiff's cause of action arose before the

punitive damages statute was amended, the trial court limited the amount of punitive damages that could be awarded against the defendant to the amount of the actual damages, based on the amendment to the statute. In its opinion reversing the trial court, the Oklahoma supreme court first looked to its decision in *Thomas v. Cumberland Operating Co.,supra,* and stated:

> The issue in *Thomas* was whether Okla. Stat. tit. 12 §1055 (Supp. 1975), should be applied retroactively. Section 1055 increased the benefits for wrongful death. This Court held that '[s]tatutory increases in damage limitations are changes in substantive rights and not mere remedial changes.' *Thomas*, 569 P.2d at 976. Of no less effect are the statutory limitations on all recoverable damages. Limitations on damages, whether actual or punitive, can constitute changes in substantive rights. We hold that the 1986 amendment to section 9 should be applied prospectively only.

Majors v. Good, supra at 422. The case of *Mantha v. Liquid Carbonic Industries*, 839 P.2d 200 (Okla. App. 1992) (certiorari denied Oct. 6, 1992) involved the substantive right of an employee to file a wrongful discharge action under the Workman's Compensation Act. The right was established by 85 Okla. Stat. §5 which permits recovery of actual and punitive damages. In 1986, the legislature amended 85 Okla. Stat. §6 to provide that an award of punitive damages shall not exceed $100,000. In the *Mantha* case the employer argued that the cap applied retroactively. The court held that retroactive limitation of punitive damages was not a correct assessment of the law.

> The Workers' Compensation Act provides a cause of action which would not otherwise exist, and §6 was added to qualify the damages available. Even though the statute has been amended, subsequent to the accrual of Mantha's cause of action, only the statute in effect at the time of his termination is applicable to the facts in this case. The provision for damages is substantive and not procedural, so a retroactive application of the statute as amended would have the effect of eliminating the plaintiff's cause of action. The record adequately supports the jury's award of punitive damages to Mantha.

Id. at 205.

The Oklahoma supreme court construed the provisions of "the Sweetheart Gas Bill", 52 Okla. Stat. §541-47, and described the substantive rights enacted by the legislature. The court stated:

> The purpose of the bill, as stated in §541, is to protect the rights and correlative rights of all interest owners of natural gas wells affording each the opportunity to extract and sell their proportionate share of gas.

Maxwell v. Samson, supra at 1170. Section 541 of the legislation concludes, "It is further the intent of this act to protect such owners against discrimination in purchases in favor of one owner as against another." In *Seal v. Corporation Commission*, 725 P.2d 278 (Okla. 1986), the Oklahoma supreme court quoted the concurrent resolution of the Oklahoma Legislature condemning the predatory and

discriminatory practices in sales of gas that precipitated passage of "the Sweetheart Gas Bill." Referring to the legislation, the court stated:

> The Act differs with all previous legislation in that it is directed towards producers rather than purchasers and towards co-owners within a single well as opposed to owners of interests between wells in a common source of supply. Moreover, the Act entitles each owner to share ratably in the revenues generated by the sale of production and creates a type of cotenancy property interest in such proceeds.

The legislation included the recovery of threefold damages as an element of the substantive right created by the statute for persons such as the Maxwells who were not receiving any benefit from their ownership interest in the well from which gas was being sold. The treble damages provision served not only as a penalty for violation of the statute, but also as encouragement to working owners to exercise their rights under the statute and thereby help reform the discriminatory practices that were the subject of the legislation.[1]

The legislation became effective in May of 1983, the year the Kinnikin well was drilled. The Maxwells' lawsuit against Samson was filed in March 1987 and tried in May 1988. The Maxwells substantive rights are governed by the law in effect during that period, not the law as amended in

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[1]*See also Rodebush v. Okl. Nursing Homes, Ltd.*, 867 P.2d 1241, 1247 (Okla. 1993) in which the Oklahoma supreme court stated that a plea for punitive damages is an element of recovery of the underlying cause of action.

1992.[2] Samson's statement that the "New Law" that modified "the Sweetheart Gas Bill" and repealed the treble damages provision applied to all owners and to all producing wells simply is not true. Samson is referring to the Production Revenue Standards Act, 52 Okla. Stat. §§570.1-570.15 which relates to payment of royalties. It has nothing to do with "the Sweetheart Gas Bill" or treble damages. "The Sweetheart Gas Bill" 52 Okla. Stat. §§541-547 was modified by the Natural Gas Marketing Act and recodified as 52 Okla. Stat. §§581.1-581.10. The treble damages provision of "the Sweetheart Gas Bill" is repealed in 52 Okla. Stat. §581.10, but there is nothing in §581.10 or in the Natural Gas Marketing Act as a whole that supports any retrospective application or effect of the statute. Samson's argument to the contrary has no support in Oklahoma law.

In its response to the Maxwells' petition for writ of certiorari, Samson has cited cases from other jurisdictions and four Oklahoma cases that Samson suggests support its argument. The four Oklahoma cases are inapposite because they involved procedural and not substantive matters. "Statutes affecting procedure only, as distinguished from those that affect substantive rights, may be applied retroactively." *Trinity Broadcasting Corp. v. Leeco Oil Co.*, 692 P.2d 1364, 1366 (Okla. 1984). *Trinity Broadcasting* involved the applicable limitations period. *Jeffcoat v. Highway Contractors, Inc.*, 508 P.2d 1083 (Okla. App. 1972), involved the applicability of an amended statute allowing attorney's fees to be taxed as costs.

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[2] "The rights of the parties are to be determined as they existed when suit was commenced." *Gibson Oil Co. v. Kelley*, 169 Okl. 218, 36 P.2d 1111, 1117 (1934). "The elements of damage recoverable by the recognized classes of beneficiaries depend upon the state of the law at the time of death." *Clark v. Jones*, 658 P.2d 1147, 1148 (Okla. 1983).

Oklahoma Water Resources Bd. v. Central Oklahoma Master Conservancy Dist., 464 P.2d 356 (Okla. 1967) involved compliance with conditions precedent which the court determined were merely procedural matters. In the case of *Texas County Irr. & Water v. Okl. Water*, 803 P.2d 1119, 1122 (Okla. 1991) the amended statute involved the method for securing judicial review, a procedural change that the court ruled could be applied retroactively. The court explained that this exception to the general rule that amended statutes are applied prospectively only was first expressed by the court in *Shelby-Downard Asphalt Co. v. Enyart*, 67 Okl. 237, 170 P. 708 (1918), a case which involved the applicability of a venue statute. In *Shelby-Downard*, the court held that a statute which does not impair vested rights, create new rights, or impose new obligations, but instead gives a remedy for enforcing existing rights and obligations, is to be liberally construed, and therefore may be applied retroactively.

The cases from other jurisdictions that Samson has cited involve, for the most part, procedural issues. In any event, they do not construe Oklahoma law and are not relevant to the Maxwells' petition. Samson also cited one case from this Court, *Ewell v. Daggs*, 108 U.S. 143 (1883), which involved a challenge to the Texas usury statute. If the amended statute involved had not been applied retroactively, the usury laws would have made a promissory note that was part of a contractual agreement voidable. This Court ruled that the statute did not affect any element of the rights that inhered in the contract and therefore could be applied retroactively.

The cases cited by Samson to support its argument regarding retroactive application of the repeal of the treble damages provision of the statute on which the Maxwells' claims are based do not involve substantive rights under

Oklahoma law and are not relevant to the issues raised in the Maxwells' petition to this Court. In addition, Samson's citation to *United States v. MacCollom*, 426 U.S. 317 (1976), for its argument that the Maxwells' right to judicial review is not protected by the Fourteenth Amendment to the United States Constitution is inapposite. *United States v. MacCollom* involved the question of whether the Fifth Amendment was violated by the restrictions imposed by a federal statute on the availability to an indigent federal prisoner of a free trial transcript to aid in preparation of a petition for collateral relief under the federal statutes. The case does not speak to the issue before this Court in the Maxwells' petition for writ of certiorari.

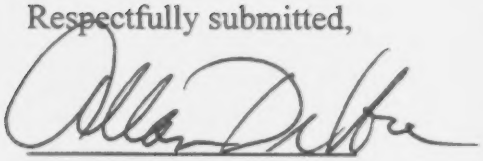
Conclusion

When the court of appeals summarily vacated the judgment of the trial court issued after remand of the case without considering the substantive findings of the trial court in light of the new standard of proof announced by the Oklahoma supreme court in the case, the Maxwells were denied one of the established common law protections against arbitrary decisions which is fundamental to procedural due process of law, the review of the case on the merits. As a result, the Maxwells have been deprived of their cause of action for treble damages without due process of *law. Honda Motor Co., Ltd. v. Oberg*, 114 S.Ct. 2331 (1994); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982); *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306 (1950).

The Maxwells respectfully request that this Court grant their Petition for Writ of Certiorari to the Court of Appeals, Division No. III, State of Oklahoma.

Dated: September 9, 1996

Respectfully submitted,



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